State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

May 9, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-09-4949; TCEQ Docket No.2008-1170-MLM-E; In Re: Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Petroleum Wholesale, L.P. DBA Sunmart 363, Respondent

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **May 31, 2011**. Any replies to exceptions or briefs must be filed in the same manner no later than **June 8, 2011**.

This matter has been designated **TCEQ Docket No. 2008-1170-MLM-E; SOAH Docket No. 582-09-4949**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at http://www10.tceq.state.tx.us/epic/efilings/ or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

William G. Newchurch
Administrative Law Judge

WGN:nl
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: **Environmental Quality, Texas Commission on (TCEQ)**

STYLE/CASE: **PETROLEUM WHOLESALE LP / SUNMART 363**

SOAH DOCKET NUMBER: **582-09-4949**

REFERRING AGENCY CASE: **2008-1170-MLM-E**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE** **ALJ WILLIAM G. NEWCHURCH**
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SOAH DOCKET NO. 582-09-4949
TCEQ DOCKET NO. 2008-1170-MLM-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY Petitioner	§	BEFORE THE STATE OFFICE
V.	§	OF
PETROLEUM WHOLESALE, L.P. DBA SUNMART 363, Respondent	§	ADMINISTRATIVE HEARINGS

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SOAH DOCKET NO. 582-09-4949
TCEQ DOCKET NO. 2008-1170-MLM-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY **Petitioner**	§	**BEFORE THE STATE OFFICE**
V.	§	**OF**
PETROLEUM WHOLESALE L.P. DBA SUNMART 363, **Respondent**	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that Petroleum Wholesale L.P. dba Sunmart 363 (Respondent) violated several of the Commission's underground storage tank (UST) and Stage II air emission control rules as well as certain sections of chapter 26 of the Water Code.[1] The ED has grouped these into 12 sets of violations. For these violations, it asks the Commission to assess a total of $130,703 in administrative penalties, and to order corrective actions.

The Respondent argues that the evidence is insufficient to show that it committed most of the violations. Even if the Commission concluded that it did, the Respondent argues that the proposed penalties are unjust and unreasonable. It asks the Commission to dismiss all of the violations and assess no penalties. In the alternative, the Respondent argues that the total penalties should not exceed $7,500.

The Administrative Law Judge (ALJ) concludes that the Respondent committed most but not all of the violations and the appropriate total penalty for its violations is $63,801. He also recommends that the Commission order most of the proposed corrective actions.

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[1] TEX. WATER CODE ANN.

II. JURISDICTION, PROCEDURAL SCHEDULE AND REPRESENTATION

On September 4, 2009, after the case was referred to the State Office of Administrative Hearings (SOAH) for hearing, the Parties stipulated to jurisdiction, waived the preliminary hearing, and proposed a schedule that the ALJ approved. The hearing was initially scheduled for June 10, 2010, but was continued twice on the motion of the Respondent. The hearing was eventually held on January 25 and 26, 2011. The record was closed on March 9, 2011, after the parties submitted written closing arguments.

The ED is represented by Laurencia N. Fasoyiro, attorney; and the Respondent is represented by Randy L. Fairless, attorney.

III. BASIC FACTS

Respondent owns and operates two USTs and a convenience store with retail sales of gasoline located at 333 Lutcher Drive in Orange, Orange County, Texas (Facility). Respondent's ownership and operation of the Facility is uncontested and demonstrated by the TCEQ PST registration filed by Respondent.[2] The Facility is located adjacent to waters of the state, which includes a ditch that feeds into a slough area that goes to Cypress Lake. The lake is located directly behind the Facility and drains into the Sabine River.[3] The Facility's USTs contained regulated petroleum substances and are not exempt or excluded from regulation under the Water Code or the rules of the Commission.

The Facility was designated by the TCEQ as a Leaking Petroleum Storage Tank (LPST) site in 1997 after Respondent removed four of its USTs. The Facility Release Determination Report (RDR) for the tank removal indicated hydrocarbon contamination; therefore, the Facility

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[2] Tr. Vol. 1 at 151-152; ED Ex. 3 at 000001-000002.

[3] Tr. Vol. at 23; ED Ex. 2.

was issued a LPST number. After the 1997 LPST designation, the Facility was again designated as a LPST site for a release that occurred from a UST system. [4]

IV. VIOLATION NOS. 1 AND 2: DISCHARGES, RELEASES, AND CLOSELY RELATED VIOLATIONS

A. Overview and Legal Standards

The ED claims that the Respondent allowed unauthorized discharges of gasoline and diesel fuel from the Facility into or adjacent to waters in the state on six occasions and failed to immediately contain or clean up after them. There is no evidence that the Commission has authorized the Respondent to discharge waste into waters in the state. The ED contends that these were violations of 30 TEX. ADMIN. CODE (TAC) §§ 327.5(a), 334.48(a), 334.75(a)(1) and (b) and Water Code § 26.121(a)(1). Those laws provide:

> Except as authorized by the commission, no person may. . . discharge . . . industrial waste into or adjacent to any water in the state . . . Water Code 26.121(a)(1).
>
> The responsible person shall immediately abate and contain the spill or discharge and cooperate fully with the executive director and the local incident command system. The responsible person shall also begin reasonable response actions which may include, but are not limited to, the following actions:
>
> (1) arrival of the responsible person or response personnel hired by the responsible person at the site of the discharge or spill;
>
> (2) initiating efforts to stop the discharge or spill;
>
> (3) minimizing the impact to the public health and the environment;
>
> (4) neutralizing the effects of the incident;
>
> (5) removing the discharged or spilled substances; and
>
> (6) managing the wastes. 30 TAC § 327.5(a).

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[4] ED Ex. 4 at 000002; Tr. Vol. 1 at 25-28; ED Ex. 39.

> Prevention of releases. All owners and operators of underground storage tank (UST) systems shall ensure that the systems are operated, maintained, and managed in a manner that will prevent releases of regulated substances from such systems. 30 TAC § 334.48(a).
>
> Owners and operators of aboveground storage tanks (AST) and underground storage tank (UST) systems must contain and immediately clean up a spill or overfill, report the spill or overfill to the agency within 24 hours, and begin corrective action in accordance with §§334.76-334.81 of this title (relating to Initial Response to Releases; Initial Abatement Measures and Site Check; Site Assessment; Removal of Non-Aqueous Phase Liquids; Investigation for Soil and Groundwater Cleanup; and Corrective Action Plan) in the following cases:
>
> (1) any spill or overfill of petroleum substance from an UST or any spill or overfill of petroleum product from an AST that results in a release to the environment that exceeds 25 gallons, or that causes a sheen on nearby surface water . . . 30 TAC § 334.75(a)(1).
>
> Owners and operators must contain and immediately clean up a spill or overfill of any petroleum substance from an UST or any petroleum product from an AST that is less than 25 gallons. Owners or operators of USTs must contain and immediately clean up a spill or overfill of a hazardous substance that is less than the reportable quantity under CERCLA (40 CFR Part 302). If cleanup cannot be accomplished within 24 hours, owners and operators must immediately notify the agency. 30 TAC § 334.75(b).

Water Code § 26.121(a)(1) prohibits the discharge of several materials, including "industrial waste," which means any waterborne liquid, gaseous, or solid substances that result from any process of industry, manufacturing, trade, or business.[5] There is no dispute that the Respondent's Facility is a business or that what was found in the ditch was a "substance." Relatedly, 30 TAC § 334.48(a) requires a UST owner to prevent the release of "regulated substances" from its UST, which would include a "petroleum substance."[6]

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[5] Water Code § 26.001(11). A "release" of a regulated substance from a UST is essentially synonymous with the term "discharge" as used in the Water Code and the Commission's rules. 30 TAC § 334.2(92). The ALJ uses the terms interchangeably in the PFD.

[6] 30 TAC § 334.2(91).

The ED claims that the Respondent violated several related rules, including 30 TAC § 334.75(a)(1), which refers to petroleum substance releases of more than 25 gallons. Only during the alleged violation on January 22, 2011, does the ED allege that more than 25 gallons of diesel was released. However, section 334.75(a)(i) imposes the same obligations on a party responsible for a release that "causes a sheen on nearby surface water." A "quantity sufficient to create a sheen" is also a "reportable quantity".[7] Thus, for purpose of proving the January 22, 2011 violations of section 334.75(a)(1) and (b), the ED need only show that a quantity sufficient to create a sheen, and not 25 gallons, of diesel was spilled.

The Respondent argues that soil and water sample results that the ED claims are due to some of the discharges are not above action levels set by the Commission. The ED argues that this is irrelevant, since neither Water Code § 26.121(a)(1) nor the rules in issue require a showing that an action level was exceeded. On this point, the ALJ agrees with the ED.

The ED alleges that discharges for which the Respondent is responsible occurred on several different dates. One is referred to as Violation No. 1 and is alleged to have occurred on January 22, 2007.[8] The others are collectively referred to as Violation No. 2 and are alleged to have occurred on February 1, June 20, and October 16, 2006, and July 2 and 27, 2007.[9] All of these are discussed below in date sequence.

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[7] 30 TAC § 327.4(b)(2)(C).

[8] ED Ex. 5 at 000028. In the amended petition, the ED alleged that this violation occurred on January 20, 2007, however all of the evidence and argument concerned events of January 22, 2007. The ALJ concludes that this was a harmless pleading error, and the Respondent does not argue otherwise.

[9] ED Ex. 5 at 000030.

B. February 1, 2006 Discharge

The alleged February 1, 2006 discharge is based on an incident report from the City of Orange Fire Department (Fire Department).[10] The Fire Department was dispatched to the Respondent's Facility after receiving reports of a diesel smell. The incident was described by the Department as a gasoline or other flammable liquid spill. The Fire Department found "a strong odor of diesel, "several inches of water on the concrete apron with what appeared to be a sheen of fuel floating on top," and "a moderate amount of fuel accumulated in the SE ditch."[11]

The Respondent claims there are several critical gaps in the evidence. It notes that the Fire Department did not perform any testing or sampling to determine the actual type of fluid found in the ditch. Nor was a further investigation performed to determine whether the sheen was from an actual release instead of from surface accumulation or a small consumer spill. Nor did the Department investigate whether there was another source of the material in the ditch. Additionally, the Respondent notes that the Fire Department describes the ditch where it "found a moderate amount of fuel" as the "SE ditch,"[12] which is to the east of the Respondent's Facility.[13] Water in this ditch flows from east to west.[14] The Respondent argues that this means the accumulation in the ditch could not have come from its Facility, but must have come from some another source further east.

The Respondent argues that all complaints to the Fire Department were coming from its neighbor Stan Floyd. The TCEQ's principal investigator for this case, Charmaine Costner, could

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[10] ED Ex. 6; Tr. Vol. 1 at 47.

[11] ED Ex. 6 at 000004-000005.

[12] ED Ex. 6 at 000004.

[13] ED Ex. 4 at 000029.

[14] Tr. Vol. 2 at 61-62; Tr. Vol. 2 at 199.

not confirm that,[15] but the General Land Office's (GLO's) Ross Penton testified that a subsequent July 2, 2007 complaint came from Mr. Floyd.[16] The Respondent and Mr. Floyd are presently engaged in related litigation.[17] During all the violation dates at issue in this case, a paint booth was being operated on Mr. Floyd's property to the east of the Respondent's Facility, and a gas station was once there.[18] The Respondent contends that some of the contamination that the ED attributes to the Respondent may have come from Mr. Floyd's property. There is insufficient evidence, however, to show that Mr. Floyd's property was the likely source or even a distinctly possible source for the discharge.

It is not impossible that there was another source for the material in the ditch on February 1, 2006, but the reference in the Fire Department report to fuel being found in the "SE ditch" is not sufficient to prove that or to even suggest a strong possibility that the material in the ditch came from a source other than the Respondent's Facility. Moreover, the Fire Department's conclusion that the material in the ditch was diesel from the Respondent's Facility appears to have been rationally based on the observations by the Department personnel that there was strong odor of diesel at the Respondent's Facility, a sheen floating on several inches of water on the Facility's concrete apron, and what appeared to be a moderate amount of fuel in the adjacent ditch. It is also reasonable to infer that the diesel first came from the Respondent's UST in which it stored diesel. There is no evidence of another supply of diesel at the Respondent's Facility or nearby.

The ALJ discounts the weight of the Fire Department report slightly because no one from the Fire Department testified. However, the ED's burden of proof is by a preponderance of the evidence,[19] not beyond a reasonable doubt as the Respondent's argument implies. In the absence

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[15] Tr. Vol. 1 at 160-161.

[16] Tr. Vol. 2 at 90.

[17] Tr. Vol. 2 at 197.

[18] Tr. Vol. 2 at 196-198.

[19] 30 TAC § 80.17(d).

of more specific evidence of another source, the ALJ finds the Fire Department report by itself is sufficient to show, under a preponderance of the evidence standard, that the material that the Fire Department found in the ditch adjacent to the Respondent's Facility on February 1, 2006, came from the Respondent's Facility.

While a chemical analysis of the material in the ditch might have more definitely shown that it was diesel, the evidence concerning its odor and the runoff from the Facility was sufficient, in the absence of contrary evidence, to show that it was diesel. As indicated above, Water Code § 26.121(a)(1) prohibits the discharge of waste without regard to its concentration. Moreover, under the Commission's rules the reportable quantity for a petroleum product in waters in the state is a quantity sufficient to create a sheen. Thus, the ED was not obligated to prove the concentration or amount of the diesel in the ditch in order to prove the alleged violations.

The ALJ does not agree that there is an evidentiary gap in regard to this first violation. He finds that the Respondent committed the alleged discharge and release violations on February 1, 2006, in violation of Water Code 26.121(a)(1) and 30 TAC § 334.48(a). It is less clear that the Respondent failed to contain and immediately clean the spill of diesel as required by 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b). In its report, the Fire Department stated that it arrived at 21:18, or 9:18 p.m., on February 1, 2006, to investigate the complaint of a spill. The Fire Department, not the Respondent, began the containment. A clean up crew for the Respondent arrived several hours later, at "1:00"—apparently 1:00 a.m.—February 2, 2006.[20] The evidence does not show whether or not cleanup was completed within 24 hours; hence, the ALJ cannot conclude that section 334.75(a)(i) and (b) were violated.

[20] ED Ex. 6 at 000004-000005.

C. June 20, 2006 Discharge

On June 20, 2006, the Fire Department was again called to the Facility and found diesel, which was also categorized as gasoline or other flammable liquid, in a ditch adjacent to the Respondent's Facility. The Fire Department notified TCEQ and the Respondent. Fire Department officials observed that the ditch at the Facility was filled with about four inches of diesel for about 200 feet. A vacuum (Vac) truck was used to vacuum the ditch to free it of diesel.[21]

On June 26, 2006, TCEQ Emergency Response Coordinator Gregory Goode conducted an investigation of the Respondent's Facility in response to the June 20, 2006 incident.[22] He observed an oily material downgradient from the Respondent's facility. He utilized a chemical test strip to assess that material, which indicated the presence of "petroleum product in the water media."[23] On cross-examination. Mr. Goode admitted that the positive test strip readings could have been caused by an organic solvent, instead of a petroleum product. He also agreed that the test strip only determined that a contaminant was present, not its quantity or whether its concentration was above a reportable limit.[24]

Once again, the Respondent argues that more specific evidence was needed from the ED to indicate the specific type of contaminant and to exclude other possible sources for the June 20, 2006 discharge. It notes that initially only the Fire Department investigated this incident. Mr. Goode arrived six days later. The Fire Department report indicated that four inches of diesel was in the ditch, but there is no evidence that the Fire Department performed

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[21] Tr. Vol. 1 at 49-50; ED Ex. 7 at 000004-000005.

[22] ED Ex. 4 at 000002-000003.

[23] Tr. Vol. 2 at 15-18.

[24] Tr. Vol. 2 at 38-39

testing or sampling to confirm that the fluid was diesel. Nor does the Fire Department report indicate that department personnel investigated other potential sources of the fluid in the ditch.

Again, the ALJ does not agree that there is an evidentiary gap. The evidence for the June 20, 2006 violations is even stronger than for the February 1, 2006 violations. The quantity of diesel in the ditch was far larger—four inches deep for 200 feet. The test strip evidence that Mr. Goode collected a few days later indicated that the material in the ditch was a petroleum product, bolstering the Fire Department's conclusion that it was diesel. Additionally, June 2006 sample results that the Respondent commissioned showed elevated levels of TPH in the ditch in front of the Respondent's property.[25] Since diesel contains petroleum hydrocarbons, the elevated TPH levels in the ditch further bolster the conclusion that what was in the ditch was diesel. It is also reasonable to infer that the diesel first came from the Respondent's UST in which it stored diesel. There is no evidence of another supply of diesel at the Respondent Facility or nearby.

As with the previous violations, the Respondent speculates that the material in the ditch may have been a different type of contaminant from a neighboring facility. From his visual assessment, Mr. Goode found no indication of another source in the area for that product, and concluded that the Respondent's facility was likely the source of that contamination.[26] The evidence the Respondent points to is insufficient to either show that there is another source or cast significant doubt on Mr. Goode's conclusion that there was none.

The Respondent contends that the June 2006 sample results, as well as samples taken in December 2006, indicate that the largest hydrocarbon concentrations were found in the east ditch, "upstream" of the Respondent's property. It also contends that the results suggest other sources of TPH, one upstream and to the east and perhaps another to the west of the Respondent's Facility. As to the June 20, 2006 violations, the December 2006 sample results are

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[25] ED Ex. 29 and Respondent Ex. 4.

[26] Tr. Vol. 2 at 18.

not very relevant. As discussed below, events after June 20, 2006, likely led to different concentrations of TPH in the ditch in December 2006.

Moreover, the evidence concerning the June 2006 sample results is insufficient to allow the ALJ to deduce a geographic pattern in the results as the Respondent suggests, much less the probability of another source for the diesel in the ditch. Those sample results show that TPH levels were generally above background. The background was <50 mg/Kg TPH, and the other samples were 26.9, 55.1, 65.3, and 154.5 mg/Kg TPH.[27] The location of the highest concentration, 154.5, is unclear. In his letter, Mr. Barron refers to that concentration as having been found in the "West ditch," yet an annotation on the Site Plan seems to indicate that highest concentration was found in the ditch in front of and at the far east of the Respondent's property.[28] Mr. Barron was apparently the sampler,[29] but he did not testify to explain this discrepancy. The Respondent's Environmental Manager, Chris Smith has some training and experience concerning UST and lines[30] and offered some opinions concerning the results of the June 2006 sampling.[31] However, he did not testify in support of the Respondent's geographic pattern argument. He did offer an opinion that the test result included TPH in the diesel range, but also stated that they also showed TPH in ranges that would not be associated with the products that Respondent sold.[32] Thus, his testimony partly supports the other evidence that there was diesel in the ditch. While raising questions about the source of the diesel, his testimony was too inconclusive to show that there was a strong likelihood that the source of that diesel was other than the Respondent's Facility. In fact, there is no specific evidence of any release upstream of the Respondent.

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[27] ED Ex. 29 & Respondent Ex 4. Although Respondent Ex. 4 refers to samples of "7/06," apparently meaning July 2006, Mr. Goode conceded that was probably a typo and should be understood as June 2006, when the June 20, 2006 violation was being investigated. Tr. Vol. 2 at 57-59.

[28] ED Ex. 29 at 000001 and 000004.

[29] ED Ex. 29 at 000024.

[30] Tr. Vol. 2 at 204.

[31] Tr. Vol. 2 at 259.

[32] Tr. Vol. 2 at 260.

The ALJ concludes that there was an unauthorized discharge and release from the Respondent's Facility on June 20, 2006, in violation of Water Code § 26.121(a)(1) and 30 TAC § 334.48(a). Additionally, the ALJ concludes that the Respondent failed to contain and immediately clean the spill of diesel as required by 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b). The evidence shows that at clean-up efforts, to the extent that the Respondent undertook them, began on July 6, 2006, at the earliest.[33] That was 16 days after the spill on June 20, 2006.

D. October 16, 2006 Discharge

On October 16, 2006, the Fire Department analyzed what it determined to be hazardous material in the ditch by the roadway and in the Facility parking lot. The Department later categorized the material as "gasoline or another flammable liquid" and as "diesel fuel."[34] It is reasonable to infer that the diesel first came from the Respondent's UST in which it stored diesel. There is no evidence of another supply of diesel at the Respondent Facility or nearby.

The Respondent raises essentially the same arguments about the October 16, 2006 violations as it made concerning the prior violations. As to these violations, the test results of December 18, 2006,[35] have great relevance. There is no evidence of an intervening event. The samples indicate TPH values of 2,557; 99.7; <50; <50; and 140.3 parts per million (ppm) moving from east to west in the ditch; and a "Background" value of 90.5 ppm.[36] The Respondent argues that the highest concentration point is actually upstream of its Facility, but that is not clear from the attached map.[37] Instead, the highest value appears to be in the ditch in front of and at the far eastern corner of the Respondent's property. Also, the December 13, 2006, samples were once

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[33] ED Ex. 4 at 000003.

[34] ED Ex. 8 at 000004-000005; Tr. Vol. 1 at 50.

[35] Respondent Ex. 6.

[36] Respondent Ex. 4 at 1 (unmarked). Comparing that exhibit and ED Ex. 29 suggests that ppm and mg/Kg are roughly synonymous.

[37] Respondent Ex. 4 at 2 (unmarked).

again taken by Allen Barron,[38] the Respondent's Environmental Manager at the time and hardly a disinterested sampler. As previously noted, Mr. Barron did not testify to explain or support these sampling results.

Once again the ALJ cannot conclude from the evidence that there was likely another source for the October 16, 2006 discharge other than the Respondent. The pattern of the TPH in the sample results is curious; it changes in the direction of the flow in the ditch from very high, to significantly elevated, to inconsequential, then to significantly elevated. However, no expert opinion evidence was offered that might have led the ALJ to conclude that pattern indicates other possible sources of the diesel in the ditch. In fact, there is no specific evidence of another source for the October 16, 2006 discharge.

Once again, the ALJ concludes that the ED has proven the discharge and release violations alleged to have occurred on October 16, 2006, in violation of Water Code 26.121(a)(1) and 30 TAC § 334.48(a). The Fire Department evidence is sufficient to sustain the ED's burden of proof, and the analysis of the Respondent's own subsequent sampling also shows that there was a discharge. Additionally, the ALJ concludes that the Respondent failed to contain and immediately clean the spill of diesel as required by 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b). The evidence shows that the Fire Department initially contained the spill and the Respondent was going to get a crew to clean it later.[39] There is no evidence showing when or if that clean-up occurred.

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[38] Respondent Ex. 4, Chain of Custody page marked as 1 of 1.

[39] ED Ex. 8 at 000003-000004.

E. January 22, 2007 Discharge

The ED contends that on January 22, 2007, more than 25 gallons (approximately 100 gallons) of diesel was discharged from the Respondent's Facility into the ditch to the south of that property, resulting in a sheen on a small lake downstream, Cypress Lake, and the death of at least 15 fish.[40] On January 22, 2007, the Fire Department again found what it concluded was diesel fuel in the ditch area in front of the Respondent's Facility.[41] On January 24, 2007, Mr. Goode conducted another investigation and again used chemical classifier strips to test for the presence of hydrocarbons in the ditch. He used the strips at a downstream location, on Cypress Lake, because he observed a sheen on the water and dead fish there.[42] These tests results indicated the presence of a petroleum product.[43] From his investigation, Mr. Goode also concluded that the Respondent's Facility was the source of the release.[44]

For this violation, the Respondent makes several arguments about the possibility of another source and the lack of adequate investigation that are the same as the arguments made concerning earlier violations. The ALJ does not agree with those arguments as to this violation either.

The Respondent also raises new arguments. The Respondent correctly notes that the formal report prepared by the Fire Department[45] and offered by the ED to prove this violation never specifically stated the source of the diesel found in the ditch. However, both that report and a subsequent email from Deputy Fire Chief, Jerald L. Ziller, to Mr. Goode[46] identified the

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[40] ED Ex. 5 at 000028.

[41] ED Ex. 9 at 000004-000005; Tr. Vol. 1 at 51.

[42] Tr. Vol. 2 at 17.

[43] Tr. Vol. 2 at 28-37; ED Ex. 32.

[44] Tr. Vol. 2 at 37.

[45] ED Ex. 9.

[46] ED Ex. 30.

Respondent as the "responsible party." Additionally in the email Deputy Chief Ziller referred to the Respondent and wrote that "the fuel leak situation is an ongoing problem with this location" and the Fire Department had "responded to this location many times after a hard rain." This is evidence that the Fire Department concluded that the diesel in the ditch came from the Respondent's Facility.

The Respondent's Mr. Smith testified that he had seen a report prepared by Action Oil, a company hired by the Respondent to vacuum the ditch after the January 22, 2007 discharge. According to Mr. Smith, that report indicated that "approximately five gallons" was removed from the ditch, not the 100 gallons of diesel claimed by the TCEQ.[47] Mr. Smith did not say what the five gallons consisted of, and the Action Oil report is not in evidence. However, Allan Barron was the Respondent's environmental manager before Mr. Smith.[48] When Action Oil Company was cleaning up after the January 22, 2007 release, Mr. Barron told Mr. Goode that 3,000 gallons of water containing five gallons of "product" had been recovered by Action.[49] Several witnesses used the word product when referring to diesel, as well as other petroleum products,[50] so the ALJ can reasonably conclude that Mr. Barron meant diesel or gasoline. It is reasonable to infer that the diesel first came from the Respondent's UST in which it stored diesel. There is no evidence of another supply of diesel at the Respondent's Facility.

As already discussed, Mr. Goode testified that he used chemical strips in Cypress Lake because he saw a sheen and dead fish there, and the strip results were positive for a chemical product. The ED offered photographs that showed dead fish and a surface sheen in a small lake downstream from the Respondent's Facility.[51] Mr. Goode agreed that the sheen and dead fish were a substantial distance from the ditch where the diesel was discharged, though he never

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[47] Tr. Vol. 2 at 216.

[48] Tr. Vol. 2 at 259.

[49] ED Ex. 4 at 000003-000004; Tr. Vol. 1 at 174-175.

[50] Tr. Vol. 1 at 28, 47, 52 & Vol. 2 at 45, 87, 205, 235.

[51] ED Ex. 31.

specified the distance.[52] Ms. Costner testified that a sheen could be created with as little as a cup of diesel,[53] and Mr. Goode testified that it would take less than a cup.[54] Mr. Goode admitted that the deaths of the fish were never specifically linked to any hydrocarbon exposure.[55] He also acknowledged that there was an RV park and a boat dock along the path from the ditch where the discharge occurred to the lake.[56]

This leads the Respondent to argue that the sheen and dead fish could have been due to other potential sources of petroleum product, such boat fuels, vehicle fuels, various oils, and charcoal lighter fluid between the discharge and the lake. That is possible, but there is no evidence that those materials were discharged. The preponderance of the evidence shows that it was the Respondent's discharge of diesel that caused the sheen.

Based on this evidence, the ALJ concludes that there was a discharge of at least five gallons of diesel from the Respondent's Facility on January 22, 2007, in violation of Water Code 26.121(a)(1) and 30 TAC § 334.48(a). The ALJ cannot conclude, however, that 25 gallons was discharged or that the discharge led to the death of fish. For that reason, the ALJ does not conclude for penalty purposes that this was a major actual release as alleged by the ED. Instead, he concludes that the January 22, 2007 discharge, like the other discharges alleged in this case, was a moderate actual release.

It is less clear the Respondent failed to contain and immediately clean the spill of diesel as required by 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b). The Fire Department arrived at the Facility at 14:46, or 2:46 p.m., on January 22, 2007, in response to the spill. The Respondent's environmental team did not arrive for another five hours, at 1943 hours, or 7:43 p.m., on January

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[52] Tr. Vol. 2 at 45-46.

[53] Tr. Vol. 1 at 169-170.

[54] Tr. Vol. 2 at 66.

[55] Tr. Vol. 2 at 42.

[56] Tr. Vol. 2 at 44-46.

22. 2007.[57] Whether clean up was completed is insufficiently clear to conclude that 30 TAC § 334.75(a)(i) and (b) were violated.

F. July 2, 2007 Discharge

On July 2, 2007, the Fire Department found at least 100 gallons of diesel mainly concentrated in the ditch in front of the Respondent's Facility. The discharge spread sheen over most of the concrete area of the Facility and downstream in the ditch past the house of a neighbor, Stan Floyd, and into nearby Cypress Lake.[58] Once again, a Vac Truck was used to remove the bulk of the diesel from the ditch and drainage system.

In addition to the Fire Department, the TCEQ's Ms. Costner; the General Land Office's Ross Penton, Assistant Director, Oil Spill Division, and Jennings Ewing, Regional Director; and Coast Guard personnel responded to the discharge.[59] They all confirmed that diesel was discharged from the Respondent's Facility to the ditch to the south and eventually to Cypress Lake.

On July 2, 2007, Ms. Costner conducted an investigation at the Facility, in response to the discharge. She observed diesel or gasoline product inside the monitoring wells within the tank hold and "canary yellow" water in the monitoring well, an indication of a release since the tank hold is supposed to be free of product.[60] The presence of product in the tank hold indicates a problem with one of the components of the tank system.[61] Ms. Costner observed diesel product at the Facility in surface cracks, in the dispenser islands, in the observation wells, in the ditch,

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[57] ED Ex. 9 at 000005.

[58] ED Ex. 10 at 000004-000005; Tr. Vol. 1 at 51-52.

[59] ED Ex. 4 at 000004 *et seq.*; Tr. Vol. 2 at 80-81, 96-98.

[60] Tr. Vol. 1 at 76; ED Ex. 15 at 000051 and 000053.

[61] Tr. Vol. 1 at 76.

and in the slough area leading to Cypress Lake.[62] Ms. Costner's conclusion was that one source of the ongoing releases was improper maintenance of the Facility's oil/water separator, which was allowed to discharge directly to a nearby ditch. Ms. Costner observed one of Respondent's employees pull the lid off the oil/water separator, which was full of product discharging into the east ditch of the Facility.[63]

Ms. Costner collected soil samples at the initial discharge site and at the beginning of the bayou feed toward Cypress Lake. She also took water samples at the initial discharge site, the ditch opposite the discharge, the second ditch leading to Stan Floyd's house, and Cypress Lake, which is approximately 500 yards from the Facility. The sample results indicated the presence of hydrocarbons in the ditches and Cypress Lake. Diesel was still present in the ditch when Ms. Costner returned to the Facility for follow-up investigations. She observed visible sheen floating on water in the ditch. There were several booms and absorbent pads that had been in place from past releases at the Facility. Photographs taken by Ms. Costner on July 5, 2007 during a follow-up investigation showed diesel leaching from the Facility's concrete parking lot onto the east side grass fence line of the Facility, as well as a sheen on Cypress Lake. There was also a dead alligator in the lake.[64]

Mr. Ewing observed sheen coming off the concrete at the Respondent's Facility and at the sumps draining down towards the east ditch. He saw that the east ditch had lots of diesel fuel in it, which went in front of the facility to the west. He followed it around through Stan Floyd's property, through the slough, and into the lake. He continued to walk around Stan Floyd's airboat shop looking for any other source. By following the path in reverse, he found that the discharge from the pipes into the ditch was coming from both the drains at the Respondent's

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[62] Tr. Vol. 1 at 77.

[63] Tr. Vol. 1 at 78.

[64] Tr. Vol. 1 at 55, 58, 59 & 60; ED Ex. 4 at 000004-000005; ED Ex. 14; ED Ex. 15 at 66, 71 & 72 & photos at 000049-000050.

Facility and the oil water separator that was on the ground. He attributed the discharge to the Facility's drains overflowing because they had not been maintained.[65]

Mr. Penton testified that he saw that the discharge originated on the east side of the Respondent's Facility. He saw nothing to indicate that it came from anywhere else. Mr. Penton walked for 150 yards along the ditch that extended upstream to the east beyond the Respondent's Facility, but did not see or smell any diesel or hydrocarbons east of the Facility. Mr. Penton has 30 years of experience in responding to petroleum product spills. He was able to identify the discharged product as diesel by its color and odor, which is consistent. He testified that the diesel was new based on its brown color. He also saw new diesel in the Facility's wells.[66]

Despite the above evidence, the Respondent refers to this incident as a potential discharge. That contradicts the incident report that the Respondent filed concerning the July 2, 2007 discharge. That report was prepared by the Respondent's Environmental Manager, Chris Smith.[67] In that report, Mr. Smith acknowledged that free product or sheen identified as "Diesel/Fuel oil" impacted "Surface water" as a result of the discharge. He stated, "Product appears to be run-off from diesel fueling area and tank hold." He indicated that the responsible party was "Petroleum Wholesale," the "tank owner." According to the Respondent's PST Registration, the Respondent owns and operates the Facility.[68] It is reasonable to infer that the diesel first came from the Respondent's UST in which it stored diesel. There is no evidence of another supply of diesel at the Respondent's Facility.

The Respondent argues that Ms. Costner's sampling was inadequate because the samples were not large enough, but the Respondent offered no expert testimony to support that criticism.

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[65] Tr. 98-100.

[66] Tr. Vol. 2 at 80-91 & 94.

[67] ED Ex. 11.

[68] ED Ex. 3.

It claims that other sampling by consultants it hired were large enough, but offered no evidence to support that assertion.

Mr. Smith testified that none of the samples taken by those third parties yielded results above the TCEQ action level and claimed that there is no proof that the dead alligator or fish were due to hydrocarbons or sheen in Cypress Lake.[69] Ms. Costner could not say whether the results of her July 2, 2007 samples were above TCEQ action levels, but she did note that some of the laboratory results for samples taken by the Respondent's consultants showed hydrocarbons in excess of action levels.[70] The ALJ agrees that the evidence is insufficient to show that the discharge led to the death of either the alligator or the fish, but the ED was not required to prove that to show that a violation occurred. The ALJ need not determine if the results for Ms. Costner's samples were above action levels because, as previously discussed, the discharge is a violation whether the resulting contamination is above action levels or not.

The ALJ concludes that a discharge and release of diesel into the surface water occurred from the Respondent's Facility on July 2, 2007, in violation of Water Code § 26.121(a)(1) and 30 TAC § 334.48(a). The Fire Department arrived at the Respondent's Facility at 14:00, or 2:00 p.m., July 2, 2007. Chris Smith, the Respondent's Environmental Manager, arrived at 18:00, or 6:00 p.m., four hours later. The Respondent did not begin containment or clean up until Action Oil Service arrived with a Vac truck sometime later.[71] The ED failed to show that the Respondent's cleanup was not completed within 24 hours; hence, the ALJ cannot conclude that the Respondent violated 30 TAC §§ 327.5 and 334.75(a)(i) as alleged.

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[69] Tr. Vol. 2 at 199.

[70] Tr. Vol. 1 at 139, 140, 143 & 144.

[71] ED Ex. 10 at 000005.

G. July 27, 2007 Discharge

The Respondent's Chris Smith submitted a report to the Commission for the July 27, 2007 incident. In the report, the Respondent identified itself as the responsible party for the spill that date and acknowledged that "Free product or sheen" identified as "Diesel/Fuel oil" from the discharge impacted "Soil." According to the Respondent, "Product from on going situation floated out of the tank pit and across parking lot due to torrential rains from approximately 7PM to 9PM." The incident report also stated, "Product was contained on property using absorbent booms and pads." [72]

The Respondent's account of the incident was corroborated by the Fire Department's incident report. The Fire Department determined the incident to be a gasoline or other flammable liquid spill. The Fire Department used barricades along with perimeter tape to block off the entrance and exit of the Facility to address the unauthorized discharge.[73]

The Respondent acknowledges that some product from its Facility floated across the parking area. However, it argues that product was contained on its own property and claims there is no evidence of any discharge from the underground storage tank or otherwise. It contends that the more plausible explanation is that the product was simply the result of surface runoff and product trapped beneath the slab (due to a leak fixed by Billy Wigginton on or about July 5, 2007)[74], which surfaced due to a heavy rain event. However, no evidence was offered by the Respondent to support its theory that the July 27, 2007 discharge was due to a prior release of diesel that was trapped beneath the slab.

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[72] ED Ex. 12.

[73] ED Ex. 13 at 000003; Tr. Vol. 1 at 54.

[74] Tr. Vol. 1 at 178.

The ALJ concludes that the Respondent allowed an unauthorized discharge of waste adjacent to the water in the state in violation of Water Code § 26.121(a)(1). The Respondent admitted that a release occurred and the released material was diesel. At the point the diesel was discharged, it became waste, confirmed by the Respondent's efforts to clean the diesel and dispose of it. Section 26.121(a)(1) makes no exception that would allow discharges to a parking lot. Moreover, the Respondent's incident report stated that the discharge impacted "Soil" contradicting Respondent's assertion that the diesel was wholly contained in the parking lot.

Nor is there an exception allowing a discharge of material trapped between slabs, even if the Respondent is correct on that point, for which it offers no evidence. Additionally, even if the diesel discharged on July 27, 2007, came from the slab due to earlier releases, it is reasonable to infer that diesel first came from the Respondent's UST in which it stored diesel. There is no evidence of another supply of diesel at the Respondent Facility. The ALJ concludes that the Respondent violated 30 TAC § 334.48(a) by allowing a release of diesel from its UST.

However, the ALJ cannot conclude that the Respondent failed to contain and immediately clean the spill of diesel as required by 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b). When the Fire Department arrived at the Facility, it found that "the owners of the business were on scene and are in the process of getting the problem solved."[75] That began an extensive clean-up and remediation effort.[76] In his written closing argument, the ED does not specifically address these alleged failure-to-contain and clean violations. Without more, the ALJ cannot find that the Respondent's efforts failed to meet those requirements.

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[75] ED Ex. 13 at 000003

[76] ED Ex. 4 at 000008-000011.

V. VIOLATION NO. 3: FAILURE TO INVESTIGATE SUSPECTED RELEASES WITHIN 30 DAYS OF DISCOVERY

The ED contends that the Respondent failed to investigate a suspected release within 30 days of discovery as required by 30 TAC § 334.74. Specifically, according to the ED, inventory control records for August 2007 indicated a suspected release that was not investigated. The ED also claims that the Respondent had still not come into compliance with section 334.74 by July 3, 2008, when the ED screened this case for enforcement action. Accordingly, the ED recommends that this violation be treated as if it occurred on 10 occasions, approximately once per month from September 30, 2007, until July 3, 2008.

The Respondent argues that the determination of when a release is suspected is necessarily a subjective one and that it never suspected a release in August 2007. It maintains that these claimed violations ignore common sense, uncontroverted testimony, and the clear intent of the statute, in order to impose a penalty. It argues that the evidence does not show that it committed this violation.

The ALJ agrees with the Respondent and recommends that the Commission dismiss this alleged violation and assess no penalty for it. Section 334.74 provides:

> Unless corrective action is initiated . . . owners or operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under §334.72 of this title (relating to Reporting of Suspected Releases) within 30 days, using either the following steps or another procedure and schedule approved or required by the agency . . . 30 TAC § 334.74.

To decide if that rule was violated, the first thing to determine is whether the Respondent had reason to suspect a release approximately 30 days before September 30, 2007. Commission rule 30 TAC § 334.72 describes several types of suspected releases for which the UST owner or operator must follow the procedures set out in 30 TAC § 334.74. These include:

- Discovery by owners and operators of released regulated substances at the UST site or in the surrounding area,
- Unusual operating conditions observed by owners or operators, such as the sudden loss of product from the UST system, unless the system equipment is found to be defective but not leaking, and
- With certain exceptions, monitoring results from a release detection method that indicates a release may have occurred.

As discussed above, diesel was discharged from the Facility on numerous occasions between February 1, 2006 and July 27, 2007. But the ED does not broadly point to the prior discharges as grounds to prove that the Respondent should have suspected a release and complied with section 334.74. Instead, the ED very specifically and narrowly claimed in his amended Petition that inventory control records for August 2007 indicated a suspected release that was not investigated.[77] Unlike the earlier releases, there is no evidence to show or even a claim by the ED that an actual release occurred in August 2007.

The ED correctly argues that the ultimate issue concerning the alleged 30 TAC § 334.74 violation is not whether a release actually occurred in August 2007. Instead, the question is whether the Respondent had reason to suspect a release and, if so, whether it notified the TCEQ within 24 hours, investigated the suspected release, and submitted an investigation report concerning the suspected release to the TCEQ within 30 days.[78]

The Facility was closed down by the Fire Department on July 27, 2007, and was not selling any diesel fuel during August 2007. Yet the Facility's inventory control records showed the following shortages in the diesel tank: 488 gallons on August 10, 2007; 24 gallons on August 14; 25-gallon shortages on August 16, 18, and 29; and a 48-gallon shortage on August 31, 2007.[79] Since the Facility was not operating or selling fuel and was fenced off and locked, [80] the

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[77] ED Ex. 5 at 000032.

[78] 30 TEX. ADMIN. CODE §§ 334.72 and 334.74.

[79] ED Ex. 17 at 000005; Tr. Vol. 1 at 84.

ED argues that the Facility should not have lost more than 488 gallons of product. The ED argues that the inventory control records for August 2007 should have led the Respondent to suspect a release and investigate.

The Respondent claims that it did not suspect a release due to the loss of 488 gallons from the diesel tank, and thus had no obligation to comply with section 334.74. When he testified, Mr. Smith denied that there was a 488-gallon release on August 10, 2007, or that there were subsequent smaller releases, in the 25- to 50-gallon range, in August 2007. Instead, he claimed that the 488 gallons were removed by MTI Environmental, LLC (MTI).[81] Both during the ED's investigation and at the hearing, the Respondent offered an August 9, 2007 MTI job information document that stated, "sucked up diesel and water out of a tank hold" on August 9, 2007.[82] On February 11, 2008, Mr. Smith attributed the 488-gallon drop in August 2007 to water removal and the smaller drops in that month to evaporation, shrinkage due to cooler temperatures, or even theft.[83]

The ED argues that the MTI document lacked any reliable information to support the Respondent's claim that it accounted for the shortage of more than 488-gallons from the tank. The MTI document does not mention the Respondent's name or its Facility location. In fact, it does not mention any customer name or location, other than "Orange Tx (Mobil)" from where water and diesel were supposedly removed. Other evidence does show that the Facility is a Mobil-affiliated station.[84] The MTI document does not state 488 gallons was removed, but it does indicate that an 80-barrel truck was used, which would have had a greater capacity than 488 gallons.

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[80] Tr. Vol. 1 at 84.

[81] Tr. Vol. 2 at 176.

[82] ED Ex. 4 at 000418; Respondent's Ex. 2; Tr. Vol. 2 at 167-168.

[83] ED Ex. 18; Tr. Vol. 1 at 99-100.

[84] ED Ex. 6 at 000004 and Ex. 21 at 000115 (Photo # 5).

Doubting the contention that MTI removed the 488 gallons, the ED repeatedly requested a waste manifest from the Respondent to corroborate that claim and to also explain where the 488 gallons were disposed.[85] Respondent never produced a manifest or even an affidavit from MTI Services to explain what was allegedly removed. Ms. Smith testified that he signed the manifest and gave it to the trucking company but failed to keep a copy. He also stated that he asked MTI many times for a copy of the manifest but was never able to obtain one.[86]

Even assuming that 488 gallons was removed by MTI and was mostly water, Ms. Costner questioned why so much water would be present in a tank hold that had gone through a test that determined it was secure from water intrusion.[87] That is a good question, but without more it is insufficient to suggest a suspected release from the tank, which is the current issue.

There also is the series of shortages in the 25- to 50-gallon range. Mr. Smith testified that this fuel was removed from the storage tank for use by Billy Wigginton, an independent contractor.[88] Mr. Wigginton informed Mr. Smith that he took the fuel for use in his personal vehicle (a diesel-powered vehicle) as well as for machinery (also diesel powered) used on the site during the remediation efforts.

Ms. Costner testified that if there were a leak, she would have expected to see it manifested by a small shortage of fuel each day as opposed to an initial 488-gallon discharge, followed by 25- or 50-gallon releases every few days for a short period thereafter.[89] Additionally, Mr. Smith testified that for five months, from July 3 until late November 2007 at a

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[85] Tr. Vol. 2 at 168; ED Ex. 4 at 000418.

[86] Tr. Vol. 2 at 241-243.

[87] Tr. Vol. 2 at 168.

[88] Tr. Vol. 2 at 177.

[89] Tr. Vol. 1 at 185.

cost of $350,000, the Respondent and/or independent third parties were present on the site 24 hours a day, seven days a week, looking for any actual sign of a release.[90]

Vapor monitoring might have indicated that there was no release in August 2007, but the evidence is insufficient to show that. As discussed below concerning Violation No. 4, however, the ALJ cannot conclude that the vapor monitoring system was working properly. That is because it failed to detect diesel releases on February 1, June 20, and October 16, 2006, and January 22, July 2, and 27, 2007. As discussed above concerning Violation Nos. 1 and 2, other evidence shows that discharges occurred on those dates. Yet the vapor monitoring system failed to detect them.

The evidence concerning the automatic tank does not support the Respondent's claim that there was no release, but it does not contradict it either. Ms. Costner testified that the gauge at the Facility was not functioning properly at the time of her investigation on July 2, 2007, less than a month before the alleged 488-gallon suspected release. The readout machine was out of paper, and one of the sensors for the diesel tank was not operating properly.[91] Mr. Smith testified that the Automatic Tank Gauge (ATG) was working properly in July 2007 and one could check the gauge even if it was out of paper, but he also admitted that the diesel probe attached to the gauge was not working at the time.[92]

To summarize, the ED claims that the shortages of 488 gallons on one day and smaller amounts on other days from the Respondent's diesel tank as shown on its August 2007 inventory control sheet should have made the Respondent suspect a release in August 2007 and comply with 30 TAC § 334.74. There is no evidence of any actual releases in August 2007. Environmental consultants retained by the Respondent were on site at the Facility throughout

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[90] Tr. Vol. 2 at 177-184.

[91] Tr. Vol. 1 at 75.

[92] Tr. Vol. 2 at 208-210.

August 2007 looking for evidence of actual releases, but none were reported. The Respondent's Mr. Smith testified that 488 gallons of water and diesel were removed from the tank by MTI and amounts of 25 to 50 gallons were removed on several occasions by one of its contractor for use in a vehicle and equipment. An MTI document, while not very specific, is consistent with and provides some support for Mr. Smith's claim that MTI removed 488 gallons from the diesel tank. Vapor monitoring by an independent contractor, FDR, showed that no leaks were detected in August 2007, but the vapor monitoring system appears to have not been working properly for several months. The evidence concerning the ATG neither supports nor contradicts the ED's claim that the Respondent had reason to suspect a release.

Based on this evidence, the ALJ cannot conclude that the Respondent had reason to suspect a release in August 2007. If it had no reason to suspect a release, it had no obligation to comply with the requirements of 30 TAC § 334.74. Therefore, Violation No. 3 should be dismissed.

VI. VIOLATION NO. 4: FAILURE TO PROVIDE RELEASE DETECTION METHOD CAPABLE OF DETECTING A RELEASE

The ED claims that the Respondent violated the following:

> A tank in an underground storage tank system must comply with commission requirements for . . . tank release detection equipment; and (2) spill and overfill equipment. WATER CODE § 26.3475(c)(1).
>
> Owners and operators of new and existing underground storage tank (UST) systems shall provide a method, or combination of methods, of release detection which shall be . . . capable of detecting a release from any portion of the UST system which contains regulated substances including the tanks, piping, and other underground ancillary equipment . . . 30 TAC § 334.50(a)(1)(A).

As already discussed, the Respondent's PST registration as of July 2007 indicated that it was using an automatic tank gauge and inventory control as a method of release detection.[93] However, the Respondent contends that it was actually using inventory reconciliation in conjunction with vapor monitoring as its primary method and ATGs as its secondary method. Documents that Ms. Costner received from Mr. Smith late in 2007 indicated that the Respondent was using vapor monitoring as a method of release detection.[94]

The Respondent's Environmental Manager, Mr. Smith, testified that the vapor monitoring system was working correctly. A UST certification report prepared by FDR Services, Inc. indicated that all of the Facility's tanks and lines passed vapor monitoring tests in August and the rest of 2007 and that its "[d]iesel tanks and line passed precision tests 7/6/07."[95] Mr. Smith worked for FDR for eight to nine years before going to work for the Respondent. During his time with FDR, Mr. Smith worked on various tasks including testing tanks, lines, leak detectors, Stage II systems, and compliant detection systems. For six years, he was operations manager for FDR.[96] To show that the vapor monitoring system was working properly, Mr. Smith notes that at Test Point 7 in 2007 hydrocarbons were detected at 5 ppm in April and May, rose to 15 PPM in June, fell to 5 ppm July, then rose to 175 ppm in August.[97]

While it may be that vapor monitoring was working properly at some test points, the ALJ concludes that it was not working properly at all points. As discussed above concerning Violation Nos. 1 and 2, the evidence shows that diesel fuel was released from the Facility on February 1, June 20, and October 16, 2006, and January 22, July 2, and July 27, 2007. There was physical evidence of diesel in the ditch immediately south of the Respondent's Facility that was observed by Fire Department, GLO, and TCEQ personnel.

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[93] ED Ex. 3 at 000004.

[94] Tr. Vol. 1 at 74.

[95] ED Ex. 17 at 000001; Tr. Vol. 1 at 84.

[96] Tr. Vol. 2 at 203-204.

[97] Tr. Vol. 2 at 223-224.

The vapor monitoring point nearest to the ditch where diesel was found was Test Point 10. Yet the vapor monitoring reports for June and October 2006 and January 2007 showed readings of 5 ppm of hydrocarbon. That is the second lowest level of hydrocarbons detected at Test Point 10 from June 2006 through November 2007, and apparently is the background level. In July and August 2007, no hydrocarbons were detected at Test Point 10, strongly suggesting that the monitor was not working at all or that that there was a data capture problem. One of those months when no hydrocarbons were detected was July 2007, which included the two dates when perhaps the largest discharge of diesel was found in the ditch by the Fire Department, GLO, and TCEQ personnel.[98] The ED contends that this shows that the vapor monitoring system was not working properly.

The Respondent contends that the ED's reasoning is flawed. It claims that the ED assumes, but failed to prove, that diesel was released to the ditch. Based on that incorrect assumption, according to the Respondent, the ED concludes that the vapor monitoring system was not working because it failed to detect releases that may not have occurred. The ALJ does not agree with the Respondent that the ED's reasoning is flawed.

The ALJ finds that the vapor monitoring system at Test Point 10 was not working properly when it detected only 5 ppm of hydrocarbons in June and October 2006 and January 2007 and no hydrocarbons in July 2007. As indicated above, there were significant discharges into the ditch in front of Respondent's Facility on certain dates in those months. The Respondent argues that is unproven but that is incorrect. Thus, when the vapor monitoring system at Test Point 10 near the ditch failed to detect significant levels of hydrocarbons it could not have been working properly.

Despite that, the Respondent argues that it was still providing the required release detection because it had a secondary detection method, an automatic tank gauge. Yet Mr. Smith

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[98] ED Ex. 17 at 000001 and Ex. 19 at 000001-000002; Tr. Vol. 1 at 93-95. Also see citations above concerning Violation Nos. 1 & 2.

admitted that the Facility's diesel tank had a problem with sludge at the bottom that trapped or captured a water float preventing proper operation of the ATG.[99] Additionally, in July 2007, when two large releases occurred and Mr. Costner investigated, the ATG readout machine was out of paper and one of the sensors for the diesel tank was not operating properly.[100] The Respondent argues that is not relevant since some ATGs are sold without a printer, which is not necessary for the proper operation of the gauge. That is beside the point. Releases occurred from the Facility's UST system on February 1, June 20, and October 16, 2006, and January 22, July 2, and July 27, 2007, yet the Facility's vapor monitoring system and its ATGs failed to detect them.

The evidence shows that the vapor monitoring system was not working properly, and there is insufficient evidence to conclude that the ATGs were working properly. The ALJ concludes that the Respondent violated Water Code § 26.3475(c)(1) and 30 TAC §334.50(a)(1)(A) by failing to provide a release detection method capable of detecting a release from any portion of the UST system.

VII. VIOLATION NO. 5: FAILURE TO MEASURE THE WATER LEVEL

The ED recommends a single penalty be assessed for Violation Nos. 4 and 5.[101] In addition to TEX. WATER CODE § 26.3475(c)(1), quoted above, the ED claims that the Respondent violated 30 TAC § 334.50(d)(1)(B)(iii)(IV) and (d)(4)(A)(i), which provide:

> (d) Allowable methods of release detection. Tanks in a UST system may be monitored for releases using one or more of the methods included in paragraphs (2) - (10) of this subsection. Piping in a UST system may be monitored for releases using one or more of the methods included in paragraphs (5) - (10) of this subsection. Any method of release detection for tanks and/or piping in this section

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[99] Tr. Vol. 2 at 209.

[100] Tr. Vol. 1 at 75.

[101] ED Ex. 5 at 000034.

shall be allowable only when installed (or applied), operated, calibrated, and maintained in accordance with the particular requirements specified for such method in this subsection.

(1) Tank tightness testing and inventory control. A combination of tank tightness testing and inventory control may be used as a tank release detection method only until December 22, 1998, subject to the following conditions and requirements.

. . .

(B) Inventory control. All inventory control procedures shall be in conformance with the following requirements.

. . .

(iii) The operator shall assure that the following additional procedures and requirements are followed.

. . .

(IV) The measurement of any water level in the bottom of the tank shall be made to the nearest 1/8 inch at least once a month, and appropriate adjustments to the inventory records shall be made.

. . .

(4) Automatic tank gauging and inventory control.

(A) A combination of automatic tank gauging and inventory control may be used as a tank release detection method, subject to the following requirements.

(i) Inventory control procedures shall be in compliance with paragraph (1)(B) of this subsection.

The ED maintains that the inventory records from the Respondent showed that the water levels of the diesel tank were not measured or checked. The sections for noting the "Water Stick Level" on the inventory record sheets for the diesel tank were left blank for February, March, April, May, and June 2007.[102] The ED contends that the Respondent has provided no evidence to show the water levels were checked for those time periods.

The Respondent maintains that the ED's claim is unfounded. It argues that the ED has offered absolutely no affirmative evidence of Respondent's purported failure to measure the water level in its tanks. It also contends that the ED is ignoring the fact, as testified to by

[102] ED Ex. 20 at 000007 -000022; Tr. Vol. 1 at 97.

Mr. Smith, that the Respondent had automatic tank gauges with alarms in place, which continually monitored the water levels to the nearest 100th of an inch.[103]

The Respondent is incorrect when it argues that the ED offered no evidence to prove this violation. The ED offered into evidence the Respondent's inventory control sheet which left the "Water Stick Level" blank. In the absence of controverting evidence, that would be sufficient to lead to a reasonable inference that the Respondent never measured the water levels during that time period. Thus, the burden of persuasion shifted to the Respondent to offer proof that it measured the water levels.

Mr. Smith's testimony that the ATG was properly running and continuously measuring water levels in the tanks is some evidence to rebut the ED's evidence. However, as already discussed, Ms. Costner conducted an inspection in July 2007, the month after the string of five months when water stick levels were not recorded on the inventory control sheets. During her inspection, the ATG readout machine was out of paper and the ATG probe inside the diesel tank was not operating properly.[104] Mr. Smith agreed that both of those things were true.[105] That evidence undermines Mr. Smith's and the Respondent's claim that the ATG was working properly and recording water levels from February through June 2007. Moreover, Mr. Smith testified that the ATG could print the last 12 months of the tank release inspection reports generated by the tank gauge, including water level in the tank, the date and time, and a variety of other information.[106] If the ATG was properly working, the Respondent could have printed out that report to show that it was recording water levels, but it offered no such report as evidence.

Given the above, the ALJ cannot conclude that the ATG was operating properly and recording water levels in the diesel tank from February through June 2007. Instead, he

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[103] Tr. Vol. 2 at 220.

[104] Tr. Vol. 1 at 75.

[105] Tr. Vol. 2 at 208-210.

[106] Tr. Vol. 2 at 208-209.

concludes, as alleged by the ED, that the Respondent failed to record those water levels during that period and in so doing violated TEX. WATER CODE § 26.3475(c)(1) and 30 TAC § 334.50(d)(1)(B)(iii)(IV) and (d)(4)(A)(i).

VIII. VIOLATION NO. 6: FAILURE TO REPORT A SUSPECTED RELEASE TO THE AGENCY WITHIN 24 HOURS OF DISCOVERY

The ED claims that the Respondent violated the following rules:

> Reportable discharge or spill. A reportable discharge or spill is a discharge or spill of oil, petroleum product, used oil, hazardous substances, industrial solid waste, or other substances into the environment in a quantity equal to or greater than the reportable quantity listed in §327.4 of this title (relating to Reportable Quantities) in any 24-hour period. 30 TAC § 327.3(a)
> Owners and operators of aboveground storage tank (AST) and underground storage tank (UST) systems must report to the agency within 24 hours (see §334.50(d)(9)(A)(v) of this title (relating to Release Detection) for reporting requirements associated with statistical inventory reconciliation inconclusive results), and follow the procedures in §334.74 of this title (relating to Release Investigation and Confirmation Steps) for any of the following conditions:
>
> (1) The discovery by owners and operators, or written notification by others to the owner or operator, of released regulated substances at the AST or UST site or in the surrounding area (such as the presence of non-aqueous phase liquids (NAPL) or vapors in soils, basements, sewer and utility lines, and nearby surface water);
>
> (2) Unusual operating conditions observed by owners or operators (such as the erratic behavior of product dispensing equipment that is consistent with or indicates a release, the sudden loss of product from the AST or UST system, or an unexplained presence of water in the tank), unless the system equipment is found to be defective but not leaking . . . 30 TAC § 334.72(1) and (2).

The ED argues, as established by Ms. Costner's testimony concerning Violation No. 3, that the Respondent's inventory control records for August 2007 indicated a suspected release that was not reported. According to the ED, Respondent was required to report the suspected release to the TCEQ within 24 hours but did not. The Respondent argues that this alleged

violation is premised on the exact same facts as Violation No. 3, it never had a reason to suspect that a release occurred in August 2007, and this allegation should be dismissed.

The ALJ agrees with the Respondent. As set out under Violation No. 3, the ALJ cannot conclude that the Respondent had reason to suspect a release in August 2007. For that reason, he cannot conclude that the Respondent had an obligation to comply with the requirements of 30 TAC §§ 327.3(a) and 334.72(1) and (2). Violation No. 6 should be dismissed.

IX. VIOLATION NO. 7: FAILURE TO EQUIP THE FILL PIPE OF THE UST WITH A TIGHT-FILL FITTING ADAPTER

> A tank in an underground storage tank system must comply with commission requirements for . . spill and overfill equipment. WATER CODE § 26.3475(c)(2).
>
> Spill and overfill prevention equipment. Except as provided in paragraph (4) of this subsection, all UST systems shall be equipped with spill and overfill prevention equipment which shall be designed, installed, and maintained in a manner that will prevent any spilling or overfilling of regulated substances resulting from transfers to such systems, as provided in this subsection.
>
> . . .
>
> (2) Equipment required. UST systems shall be equipped with each of the following spill and overfill prevention equipment or devices.
>
> (A) Tight-fill fitting. The fill pipe of the tank shall be equipped with a tight-fill fitting, adapter, or similar device which shall provide a liquid-tight seal during the transfer of regulated substances into the tank. 30 TAC § 334.51(b)(2)(A).

Ms. Costner testified that she observed a broken fill cap at the Facility's fuel port.[107] A photograph taken by Ms. Costner at the Facility on July 5, 2007, showed the broken fuel cap.[108]

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[107] Tr. Vol. 1 at 102.

[108] ED Ex. 15 at 000046.

The Respondent concedes that it had a broken plastic dust cap in place at the time of the alleged violation, and that this violated a Commission rule. But, Respondent asserts it did not violate the rule cited by the ED. Mr. Smith explained that the rule cited by the ED pertains to the fill adapter that makes a liquid-tight seal with the fill hose on the delivery tank.[109] The ED did not respond to this argument.

The ALJ agrees with the Respondent. The evidence does not show that the Respondent violated 30 TAC § 334.51(b)(2)(A), as alleged by the ED. That rule pertains to fill adapters, also known as fill fittings, not to fill caps. The ED also alleged that the Respondent violated Water Code § 26.3475(c)(2), which very generally states that a UST must comply with Commission requirements for spill and overfill equipment. However, the ED neither cited a rule nor proved that there was any Commission requirement that the broken cap violated. This may have been nothing more than a pleading error on the ED's part. Nevertheless, the ED has not shown that the Respondent committed Violation No. 7 as pleaded and, therefore, that violation should be dismissed.

X. VIOLATION NO. 8: FAILURE TO SUBMIT A REPORT REGARDING INITIAL ABATEMENT MEASURES WITHIN 20 DAYS AFTER CONFIRMATION OF A RELEASE OF REGULATED SUBSTANCES

The ED contends that the Respondent violated the following:

> Within 20 days after release confirmation, owners and operators must submit a report to the agency summarizing the initial abatement steps taken under subsection (a) of this section and any resulting information or data unless another reporting period is specified by the agency. 30 TAC § 334.77(b).

The ED argues that the evidence and testimony he presented showed releases at the Facility on February 1, June 20, and October 16, 2006, and January 22 and July 2 and 27, 2007.

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[109] Tr. Vol. 2 at 221.

The Respondent was required to submit a report regarding initial abatement measures within 20 days after confirmation of the releases of regulated substances.[110] Respondent did not submit initial site assessment reports for five of the six releases.[111] Ms. Costner testified that Respondent submitted an incomplete report for the July 2, 2007 release, but it was not timely.[112]

The Respondent argues that the ED is overreaching and proposing penalties based on prior unconfirmed purported "releases." That is incorrect. As discussed above concerning Violation Nos. 1 and 2, the ED has proven that these releases occurred.

Additionally, the Respondent argues that Violation No. 8 should be dismissed because Mr. Goode was the TCEQ investigator for these events and his investigations were closed without issuance of any penalties or further action. Because this violation was alleged by the ED only after Ms. Costner became involved and reviewed background information concerning Mr. Goode's earlier investigations, the Respondent argues for dismissal. This argument has no merit.

Mr. Goode investigated the first four releases, and Ms. Costner investigated the last two, on July 2 and 22, 2007. Even as to the first four, the Respondent cites no legal basis for its argument. The ED, not individual TCEQ investigators, initiates and sometimes dismisses enforcement cases. There is no evidence that a contested case was previously initiated by the ED based on Mr. Goode's investigations and either settled or dismissed with prejudice to refiling. Absent an applicable statute of limitations—and the Respondent does not cite one—there is no legal barrier to taking enforcement action at a later date, as the ED has in this case.

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[110] 30 TEX. ADMIN. CODE § 334.77(b). Within 20 days after release confirmation, owners and operators must submit a report to the agency summarizing the initial abatement steps taken.

[111] Tr. Vol. 1 at 104.

[112] See also ED Ex. 21.

The Respondent also claims that the required reports were submitted. Mr. Smith testified that for each release prior to July 2, 2007, Allen Barron, Respondent's former Environmental Manager, submitted reports to the TCEQ.[113] However, the Respondent offered no copies of written reports or emails to support that claim. Nor did Mr. Barron testify.

As to the July 2, 2007 release, Mr. Smith testified that he never typed a piece of paper that said "assessment." But he claimed that he was in constant communication with the TCEQ through emails and face-to-face communications. However, the Respondent offered no copies of emails that Mr. Smith sent to show compliance with the requirements of 30 TAC § 334.77(b). Mr. Smith also testified that there was a July 18, 2007 meeting concerning the July 2, 2007 release at which 15 to 20 people were present, including representatives of the Fire Department, GLO, and the TCEQ.[114]

The Respondent also claims that a 10-item to-do list was created during the remediation effort and signed by Mr. Smith, Ms. Costner, Derek Eades of TCEQ, and Mr. Penton of the GLO. The ALJ cannot find this in the evidence at the place the Respondent cited.[115] Even assuming that it is in evidence and contains what the Respondent describes, the to-do list would not be sufficient. Section 334.77(b) requires an after-the-fact summary of "the initial abatement steps taken under [334.77(a)] and any resulting information or data." A before-the-fact to-do list would not satisfy that requirement.

The Respondent apparently concedes that formal written reports were not submitted for the July 2, 2007 release. According to the Respondent, nothing in the cited rule states that a formal, written report is required or that the rule is not satisfied by oral or email communications. The ALJ concludes, however, that 30 TAC § 334.77(b) contemplates and requires the

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[113] Tr. Vol. 2 at 222.

[114] Tr. Vol. 2 at 222.

[115] The Respondent cited to ED Ex 4 at 114.

submission of a formal written report. It states that the report must summarize the initial steps taken under 30 TAC § 334.77(a), which requires six complex removal, visual inspection, monitoring, remediation, measurement, and investigation activities. The ALJ cannot conclude that the rule contemplates that an informal oral report would be sufficient to meet the reporting requirement. Perhaps a long detailed email or other electronic communication rather than a report printed on paper would be sufficient, but the Respondent offered no print-outs of such electronic communication as evidence to rebut Ms. Costner's testimony that no reports were submitted.

Thus, the ALJ concludes that the Respondent violated 30 TAC § 334.77(b) on six occasions, once for each of the six proven releases, by not submitting the report required by that rule.

XI. VIOLATION NO. 9: FAILURE TO CONDUCT DAILY AND MONTHLY INSPECTIONS OF THE STAGE II VAPOR RECOVERY SYSTEM

The ED argues that the Respondent violated the following:

> A person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order. TEX. HEALTH & SAFETY CODE ANN. (Health and Safety Code) § 382.085(b)
>
> The owner or operator of any motor vehicle fuel dispensing facility subject to the control requirements of this division (relating to Control of Vehicle Refueling Emissions (Stage II) at Motor Vehicle Fuel Dispensing Facilities) shall conduct daily inspections of the Stage II vapor recovery system for the defects specified in §115.242(3) and (4) of this title (relating to Control Requirements) as follows.
>
> (1) For all systems, the daily inspections shall include the applicable portions of §115.242(3)(A)--(F), (H), and (K), and (4) of this title.
> . . .
>
> (3) For all systems, the components listed in §115. 242(3)(J) of this title shall be inspected at least monthly. 30 TAC § 115.244(1) and (3).

Orange County is in a non-attainment area, and persons there are subject to the requirements of 30 TAC § 115.244(1) and (3).[116] Mr. Smith testified that he personally goes to each of the Respondent's stations every 60 days and conducts his own inspection of the tank gauge, spill buckets, and Stage II notebooks to ensure the proper tasks are in fact being performed. He also stated that the required daily and monthly inspections were in fact conducted as required at this location.[117] The Respondent argues that the ED has produced no evidence to rebut Mr. Smith's testimony. That is incorrect.

Ms. Costner testified that, during her investigation of the Facility on July 23, 2009, she requested the daily and monthly inspection records of the Stage II vapor recovery system from Respondent's store manager, Mr. Kamrul Islam (Mr. Islam). He informed Ms. Costner that the Facility had not been conducting the inspection of the Stage II vapor recovery system since May 2009.[118]

The Respondent argues that Mr. Islam is not its employee, but rather an employee of its lessee. It contends that it takes steps to ensure that lessees know where the records are kept, but there is no way to ensure that all of its lessee's employees are properly trained. Perhaps so, but Mr. Islam did not tell Ms. Costner that he did know about the records. Instead, he specifically told her that the inspections had not been conducted.

The Respondent also argues that Ms. Costner could very easily have directed her inquiry to the Respondent itself, rather than Mr. Islam. That is exactly what she did. Ms. Costner testified that she also requested the inspection records from Mr. Smith, and the records were

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[116] Tr. Vol. 1 at 115. 30 TAC § 115.249(a) provides that the rules in 30 TAC Chapter 115, Subchapter C, Division 4, which includes 30 TAC § 115.244, apply to several counties, including Orange County where Respondent's Facility is located.

[117] Tr. Vol. 2 at 210.

[118] Tr. Vol. 1 at 113.

never submitted to her.[119] Nor did the Respondent offer the inspection records at the hearing to rebut Ms. Costner's testimony and show that it had conducted the inspections.

At a minimum, a facility subject to 30 TAC § 115.244 must keep and make available to the ED's representative upon request its daily Stage II inspection records.[120] When those records are requested by an ED representative, like Ms. Costner, and not produced and there is no reasonable explanation offered for the failure to produce, it is reasonable to conclude that the inspections were not performed. That is what the ALJ concludes.

The ALJ finds that the Respondent violated Health and Safety Code § 382.085(b) and 30 TAC § 115.244(1) and (3), as alleged by the ED.

XII. VIOLATION NO. 10: FAILURE TO VERIFY PROPER OPERATION OF THE STAGE II VAPOR SPACE MANIFOLDING AND DYNAMIC BACK PRESSURE AT LEAST ONCE EVERY 36 MONTHS

In addition to Health and Safety Code § 382.085(b) quoted above, the ED alleges that the Respondent violated 30 TAC § 115.245(2), which states:

> For all affected persons, compliance with §115.241 and §115.242 of this title (relating to Emission Specifications and Control Requirements) shall be determined at each facility by testing as follows.
> . . .
>
> (2) Verification of proper operation of the Stage II equipment must be performed in accordance with the test procedures referenced in paragraph (1) of this section at least once every 12 months. The verification must include all functional tests that were required for the initial system test, except for TXP-101, Determination of Vapor Space Manifolding of Vapor Recovery Systems at Gasoline Dispensing Facilities, and TXP-103, Determination of Dynamic Pressure Performance

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[119] Tr. Vol. 1 at 113.

[120] 30 TAC § 115.246(6) & (7).

(Dynamic Back-Pressure) of Vapor Recovery Systems at Gasoline Dispensing Facilities, which must be performed at least once every 36 months.

This is another Stage II rule that must be complied with in Orange County.[121] The Respondent is required to conduct compliance testing every three years for the Stage II vapor space manifolding and dynamic back pressure. That testing was due on January 28, 2007, but it was not successfully conducted until July 22, 2008.[122]

Mr. Smith testified that the Respondent conducted these tests but failed to submit the results to the TCEQ.[123] The results of that earlier testing are in the record, however. They show that the Stage II equipment did not pass those earlier tests. On May 28, 2008, the Stage II equipment failed the Dynamic Backpressure test, which precluded the rest of the testing. On June 6, 2008, the equipment failed the Dynamic Backpressure test, and the Vapor Space test was inconclusive.[124]

The ED argues that the rule requires a successful testing. Respondent did not conduct a *successful* full system triennial test until July 22, 2008, approximately 17 months after it was due.[125] The ED contends that this was a violation. The Respondent argues that the ED is attempting to change the requirement by claiming that a successful test is required. It claims the rule only requires verification of the proper operation of the equipment.

The ALJ agrees with the ED's interpretation that a successful test is required to verify that the equipment is operating properly. The ALJ concludes that the Respondent violated 30 TAC § 115.245(2) and Health and Safety Code § 382.085(b), as alleged by the ED.

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[121] Tr. Vol. 1 at 115; 30 TAC § 115.245(2) is also included in 30 TAC Chapter 115, Subchapter C, Division 4.

[122] Tr. Vol. 1, page 114-116; ED Ex. 23 at 000005 and ED Ex. 24 at 000003.

[123] Tr. Vol. 2, page 211, line 20-25.

[124] ED Ex. 23 at 000002, 000005, 000029 & 000038.

[125] ED Ex. 23, ED's investigation report No. 764090, at bates page 000005, emphasis added.

XIII. VIOLATION NO. 11: FAILURE TO MAINTAIN STAGE II RECORDS AT THE STATION AND MAKE THEM IMMEDIATELY AVAILABLE FOR REVIEW UPON REQUEST BY AGENCY PERSONNEL

In addition to Health and Safety Code § 382.085(b) quoted above, the ED alleges that the Respondent violated 30 TAC § 115.246(7)(A), which states:

> The owner or operator of any motor vehicle fuel dispensing facility subject to the control requirements of this division (relating to Control of Vehicle Refueling Emissions (Stage II) at Motor Vehicle Fuel Dispensing Facilities) shall maintain the following records:
> . . .
>
> (7) all records shall be maintained for at least two years, except that the CARB Executive Order(s) or third-party certification(s) specified in paragraph (1) of this section, any applicable alternate method of control requirement approval specified in paragraph (2) of this section, and testing results specified in paragraph (5) of this section shall be kept on-site indefinitely. These records shall be:
>
> (A) kept on-site at facilities ordinarily manned during business hours, and made immediately available for review upon request by authorized representatives of the executive director, EPA, or any local air pollution control program with jurisdiction . . .

During Ms. Costner's July 23, 2009 investigation, she requested the Facility's Stage II records from Mr. Islam and he did not provide the records.[126] The Respondent argues that the ED is attempting to sanction it for a misunderstanding over which it had no control. It claims the Stage II records were at the station, but Mr. Islam, who was the station attendant but was not an employee of the Respondent, did not know that.[127] However, Ms. Costner also requested the records from Mr. Smith and he failed to provide them.[128]

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[126] Tr. Vol. 1 at 117.

[127] Tr. Vol. 2 at 212-213.

[128] Tr. Vol. 1 at 117.

The ALJ finds that the ED has proven Violation No. 11. Once Ms. Costner requested the records from Mr. Smith, the Respondent's Environmental Manager, arguments concerning Mr. Islam's knowledge and employer became largely irrelevant. Since Mr. Smith failed to produce the records when requested, it is reasonable to infer that they were not kept at the Station as required. The ALJ concludes that the Respondent committed Violation No. 11 as alleged by the ED.

XIV. VIOLATION NO. 12: FAILURE TO REMOVE AND PROPERLY DISPOSE OF ANY LIQUID OR DEBRIS FOUND DURING AN INSPECTION OF ANY SUMPS, MANWAYS, OVERSPILL CONTAINERS OR CATCHMENT BASINS ASSOCIATED WITH A UST SYSTEM WITHIN 72 HOURS OF DISCOVERY

The ED alleges that Respondent violated the following rule:

> Any sumps (including dispenser sumps) or manways installed prior to January 1, 2009, which are utilized as a integral part of a UST release detection system, and any overspill containers or catchment basins installed at any time, which are associated with a UST system must be inspected at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid tight. Any liquid or debris found in them during an inspection must be removed and properly disposed of within 72 hours of discovery.[129]

During Ms. Costner's investigation on July 23, 2009, the spill buckets contained liquid and debris.[130] She further testified that, when she reviewed the Respondent's records, they indicated that the Respondent had last inspected the spill buckets on June 29, 2009, and they contained liquid and debris that was not removed.[131] The records themselves are not cited by the ED, and the ALJ cannot find them in the evidence.

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[129] 30 TAC § 334.42(i) (June 23, 2009). Very recently and more than one and one-half years after the alleged violation, 30 TAC § 334.42(i) was amended to, among other things, allow 96, instead of 72, hours to remove and properly dispose of liquid or debris. Proposed October 1, 2010, 35 Texas Register 8880. Adopted March 11, 2011, 36 Texas Register 1675.

[130] Tr. Vol. 1 at 119; ED Ex. 25 at 000002 (photo).

[131] Tr. Vol. 1 at 119-120.

The Respondent argues that the ED alleges Violation No. 12 based on absolutely nothing more than conjecture and speculation. Mr. Smith testified that the spill buckets were cleaned out after the June investigation.[132] The Respondent contends that the liquid and debris in question may have entered the spill buckets after the Respondent cleaned them out in June.

The ALJ agrees with the Respondent. It is difficult to believe that the spill buckets were inspected in June 29, 2009, and were full of water and debris, yet the Respondent chose not to clean them. That would have been irrational, and Mr. Smith testified that it did not happen. He claimed that the buckets were cleaned out on June 29, 2009. If that were so, there is no additional evidence to show that water and debris collected again in the buckets at least 72 hours before Ms. Costner inspected them on July 23, 2009.

Given this, the ALJ concludes that the evidence is insufficient to show that the Respondent committed Violation No. 12. He recommends that the Commission dismiss this violation.

XV. PENALTIES

The ED is recommending a total of $130,703.00 in administrative penalties for the alleged violations. Elvia Maske, a Commission Enforcement Coordinator with 15 years of experience, testified that the penalties were calculated in accordance with the Commission's September 2002 Penalty Policy (Penalty Policy).[133] Except as discussed below, the Respondent does not dispute that the penalties were calculated in accordance with the Penalty Policy. However, the Respondent generally claims that the proposed penalties are excessive, unproven, and unjustified.

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[132] Tr. Vol. 2 at 215.

[133] Tr. Vol. 2 at 104, 112, 119-120; ED Ex. 34.

The ALJ concludes that the appropriate total penalty amount for the violations proven in this case is $63,801.

The ED's proposed penalty for each violation is set out below:

ED's PROPOSED PENALTIES[134]			
Violation	**Category**	**Events**	**Penalties**
1. Discharge	Major Actual	1	$10,000
2. Discharges	Moderate Actual	5	$26,773
3. Failure To Investigate Suspected Release	Major Potential	10	$53,545
4 & 5. Failure To Provide Release Detections & Failure To Measure Water Level	Major Potential	1	$5,355
6: Failure To Report Suspected Release	Major Programmatic	1	$2,677
7: Failure To Equip The Fill Pipe With Adapter	Moderate Potential	1	$2,677
8: Failure Report Initial Abatement Measures	Major Programmatic	6	$16,064
9: Failure To Conduct Inspect Stage II System	Moderate/Potential	1	$3,003
10: Failure To Verify Proper Operation Of The Stage II	Major/Potential	1	$4,603
11: Failure To Maintain Stage II Records And Make Them Available	Major Programmatic	1	$3,003
12: Failure To Remove And Dispose Of Liquid Or Debris In Containment	Major/Moderate	1	$3,003
TOTAL			**$130,703.00**

As to Violation No. 1, the discharge and release on January 22, 2007, the Respondent contends the violation was not proven. However, the ALJ has already concluded that it was proven. The Respondent also claims that the penalty is excessive. The ALJ agrees with the Respondent in part. As previously discussed, the ALJ cannot conclude based on the evidence that 25 gallons were discharged or that the discharge led to the death of fish. For that reason, the

[134] ED Ex. 5 at 000016-000041.

ALJ does not conclude for penalty purposes that this was a major-actual release as alleged by the ED. Instead, he concludes that the January 22, 2007 discharge, like the other discharges in this case, was a moderate-actual release. In accordance with the Penalty Policy, the ALJ recommends a $5,000 penalty for Violation No. 1.

As to Violation No. 2, the remaining five discharges and releases, the Respondent reurges its argument that they were not proven. The ALJ disagrees with the Respondent and agrees with the ED's proposed penalty for Violation No. 2. Even though the ED failed to prove that all of the rules were violated on February 1, 2006, and January 22 and July 2 and 27, 2007, as alleged, he did prove the discharge and release violations on those dates. Since the same penalty would be appropriate for even a single violation of an applicable law on each of those dates, there is no reason to lower the penalty.

As to alleged Violation No. 3, the ALJ agrees with the Respondent that the evidence is insufficient to show that the Respondent had reason to suspect a release in August 2007 that it failed to investigate within 30 days. Relatedly, since he cannot conclude that the Respondent had a reason to suspect a release in August 2007, the ALJ cannot find that the ED has proven that the Respondent failed to report it within 24 hours, as alleged in Violation No. 6. No penalty should be assessed for these unproven violations. Additionally, alleged Violation No. 7, concerning a broken fill cap, was not proven as pled, and no penalty should be assessed for it. The ALJ also finds that the evidence is insufficient to prove Violation No. 12, concerning water and debris in spill buckets for more than 72 hours.

The ALJ disagree with the Respondent's claim, however, that Violation Nos. 4, 5, 8, 9, 10, and 11 were not proven. The ALJ sees no reason to disagree with the ED's recommended penalties for those violations, which were calculated in accordance with the Penalty Policy.

In regard to Violation 10, which concerns the Respondent's failure to verify the Stage II vapor space manifolding and dynamic back pressure at least once every 36 months, the

Respondent argues that no penalty should be assessed even if there was a violation. It claims that at the time of the violation, in January 2007, no penalty was required. Based on that, the Respondent argues that assessing a penalty would be unjust.

It is not even clear from the evidence that there has been a change as the Respondent contends. Mr. Smith testified that Violation No. 10 only became a Category A violation on July 1, 2008, but he did not indicate the basis for that understanding.[135] He is not a Commission employee who might have direct knowledge about a policy change, and he pointed to no Commission document to support his assertion. The Enforcement Coordinator for this case is Elvia Maske. She testified that this case contains Category A violations, which automatically trigger enforcement. She listed discharges and releases as examples of Category A violations and stated that other pending violations by the same respondent are handled together in the same case when there is at least one Category A violation. She could not agree that there had even been a category change pertinent to Violation No. 10.[136]

The ALJ does not agree that it would be unjust to assess a penalty for Violation No. 10. Even assuming that there was a change in policy after the violation was committed and the ED is now required to bring an enforcement action when in the past he could have chosen not to, there is nothing to indicate that a new requirement was imposed on the Respondent after the fact or even that the penalty amount was raised. The ALJ cannot agree that the Commission is bound to let certain violations go unpunished just because it did so in the past. The ALJ recommends no reduction in the penalty proposed by the ED for Violation No. 10.

To summarize, the ALJ recommends the following penalties:

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[135] Tr. Vol. 2 at 211-212.

[136] Tr. Vol. 2 at 109-110, 132 & 160.

ALJ's PROPOSED PENALTIES			
Violation	**Category**	**Events**	**Penalties**
1. Discharge	Moderate Actual	1	$5,000
2. Discharges	Moderate Actual	5	$26,773
3. Failure To Investigate Suspected Release	Not proven	0	$0
4 & 5. Failure To Provide Release Detections & Failure To Measure Water Level	Major Potential	1	$5,355
6: Failure To Report Suspected Release	Not proven		$0
7: Failure To Equip The Fill Pipe With Adapter	Not proven		$0
8: Failure Report Initial Abatement Measures	Major Programmatic	6	$16,064
9: Failure To Conduct Inspect Stage Ii System	Moderate/Potential	1	$3,003
10: Failure To Verify Proper Operation Of The Stage II	Major/Potential	1	$4,603
11: Failure To Maintain Stage II Records And Make Them Available	Major Programmatic	1	$3,003
12: Failure To Remove And Dispose Of Liquid Or Debris In Containment	Not proven	0	$0
TOTAL			**$63,801**

XVI. CORRECTIVE ACTIONS

In the EDFARP, the ED recommends that the Respondent be required to implement certain corrective actions.[137] The Respondent claimed that it corrected all the violations, but it did not introduce any evidence to demonstrate completion of all corrective actions. The substantive proposed corrective actions are:

> 1. Within 30 days after the effective date of the Commission Order, Petroleum Wholesale shall install or implement a release detection method for all USTs at the Facility and begin measuring the water level in the bottom of the tanks to the

[137] ED Ex. 5 at 000010-000012.

nearest 1/8 inch at least once a month and making the adjustments in the inventory records, in accordance with 30 TEX. ADMIN. CODE § 334.50.

2. Within 60 days after the effective date of the Commission Order, Petroleum Wholesale shall:

a. Resubmit the Affected Property Assessment Report incorporating the required information requested by the TCEQ Remediation Division, pursuant to 30 TEX. ADMIN. CODE § 350.91, to the Executive Director for approval. If response actions are necessary, comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TEX. ADMIN. CODE ch. 350 which may include: plans, reports, and notices under Subchapter E (30 TEX. ADMIN. CODE §§ 350.92 to 350.96); financial assurance (30 TEX. ADMIN. CODE § 350.33(1)); and Institutional Controls under Subchapter F.

b. Conduct an investigation of the suspected August 2007 release and implement appropriate corrective measures, in accordance with 30 TEX. ADMIN. CODE § 334.74;

c. Establish and implement a process for reporting a suspected or a confirmed release, in accordance with 30 TEX. ADMIN. CODE § 334.72; and

d. Submit a report to the agency summarizing the initial abatement steps taken, in accordance with 30 TEX. ADMIN. CODE § 334.77.

3. Submit written certification, including detailed supporting documentation to demonstrate compliance with the above requirement within 75 days after the effective date of the Commission Order in this case.

The ALJ finds that it would not be appropriate to order the Respondent to take Corrective Action 2.b. above. As previously discussed, the ED failed to show either that there was a release in August 2007 or that the Respondent had reason to even suspect one. Accordingly, it is not appropriate to order the Respondent to investigate and take corrective measures concerning a release that neither occurred nor was suspected. The ALJ recommends that the Commission order the Respondent to take all of the other corrective actions though.

XVII. RECOMMENDATION

The ALJ recommends that the Commission adopt the attached Proposed Order, containing Findings of Fact and Conclusions of Law, and order the Respondent to pay a total of $63,801 in administrative penalties for the violations proven in this case and to take the corrective actions listed.

SIGNED

WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
PETROLEUM WHOLESALE L.P. DBA SUNMART 363
TCEQ DOCKET NO. 2008-1170-MLM-E
SOAH DOCKET NO. 582-09-4949

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Petroleum Wholesale L.P. DBA Sunmart 363 (Respondent). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the First Amended Report and Petition on January 25 and 26, 2011, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Background

1. Petroleum Wholesale L.P. dba Sunmart 363 (Respondent) owns and operates underground storage tanks (USTs) and a convenience store located at 333 Lutcher Drive in Orange, Orange County, Texas (Facility).

2. One of the USTs at the Facility contains diesel and the others contain gasoline.

3. The Respondent's Facility is a business.

4. The Facility is located adjacent to waters of the state, which includes a ditch that feeds into a slough area that goes to Cypress Lake. The lake is located directly behind the Facility and drains into the Sabine River.

5. At all times pertinent to this case, the Facility's USTs contained regulated petroleum substances and are not exempt or excluded from regulation under the Water Code or the rules of the Commission.

6. The Facility was designated by the TCEQ as a Leaking Petroleum Storage Tank (LPST) site in 1997 after Respondent removed four of its USTs. The Facility Release Determination Report (RDR) for the tank removal indicated hydrocarbon contamination; therefore, the Facility was issued a LPST number.

7. After the 1997 LPST designation, the Facility was again designated as an LPST site for a release that occurred from a UST system.

Procedure

8. On April 1, 2009, the ED filed an Executive Director's Preliminary Report and Petition (EDPRP) and mailed a copy of it to the Respondent at its last known address of record with the Commission.

9. In the EDPRP, the ED alleged that the Respondent violated several of the Commission's underground storage tank and Stage II air emission control rules as well as certain sections of chapter 26 of the TEX. WATER CODE ANN. (Water Code). The ED proposed administrative penalties and corrective actions for these violations.

10. On April 28, 2009, the Respondent filed an answer to the EDPRP denying the allegations, contesting the proposed administrative penalties, and requesting a hearing.

11. On June 15, 2009, the ED filed a letter asking the Commission's Chief Clerk to refer this case to SOAH for hearing, and the Chief Clerk referred it to SOAH on June 23, 2009.

12. On August 4, 2009, the Chief Clerk mailed a notice of hearing to the Respondent and the ED.

13. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

14. On September 4, 2009, the Parties filed an agreed motion stipulating to jurisdiction, waiving the preliminary hearing, and proposing a case schedule, which the ALJ approved.

15. On February 8, 2010, the ED filed his First Amended Report and Petition and served a copy of it on the Respondent.

16. In the First Amended Report and Petition, the ED alleged that the Respondent violated several of the Commission's UST and Stage II air emission control rules as well as certain sections of chapter 26 of the Water Code, as discussed in detail below.

17. In the First Amended Report and Petition, the ED has grouped the alleged violationsinto 12 sets. For the alleged violations, the ED has asked the Commission to assess a total of $130,703 in administrative penalties and to order corrective actions.

18. The hearing on the merits of this case was initially scheduled for June 10, 2010, but was continued twice on the motion of the Respondent.

19. On January 25, 2011, SOAH ALJ William G. Newchurch convened the hearing as indicated in the last order of continuance.

20. At the hearing, the ED appeared through his attorney, Laurencia N. Fasoyiro, and the Respondent appeared through its attorney, Randy L. Fairless.

21. The hearing was concluded on January 26, 2011.

22. The record was closed on March 9, 2011, after the parties submitted written closing arguments.

Violation Nos. 1 and 2: Discharges, Releases, and Closely Related Violations

23. The Commission has not authorized the Respondent to discharge waste into waters in the state.

24. The ED claims that the Respondent allowed unauthorized discharges of gasoline and diesel fuel from the Facility into or adjacent to waters in the state on six occasions and failed to immediately contain or clean up after them. The ED contends that the Respondent violated 30 TEX. ADMIN. CODE (TAC) §§ 327.5(a), 334.48(a), 334.75(a)(1) and (b) and Water Code § 26.121(a)(1).

25. The ED alleges that discharges for which the Respondent is responsible occurred on several different dates. One is referred to as Violation No. 1 and is alleged to have occurred on January 22, 2007. The others are collectively referred to as Violation No. 2 and are alleged to have occurred on February 1, June 20, and October 16, 2006, and July 2 and 27, 2007. All of these are discussed below in date sequence.

February 1, 2006 Discharge

26. On February 1, 2006, City of Orange Fire Department (Fire Department) personnel were dispatched to the Respondent's Facility after receiving reports of a diesel smell.

27. Fire Department personnel arrived at the Facility at 9:18 p.m., on February 1, 2006, to investigate.

28. The Fire Department found a strong odor of diesel, several inches of water with a sheen of fuel floating on top of the concrete apron at the Respondent's Facility, and a moderate amount of diesel fuel accumulated in a ditch in front of the Facility.

29. There is no significant evidence showing that on February 1, 2006, or any other date pertinent to the alleged violations in this case, there was a source of diesel other than that stored in the Respondent's Facility's UST that could have accounted for the diesel found in the ditch in front of the Respondent's Facility.

30. The diesel in the ditch in front of the Respondent's Facility on February 1, 2006, came from the Respondent's UST in which it stored diesel.

31. The Fire Department, not the Respondent, began the containment of the discharged diesel. A clean-up crew for the Respondent arrived several hours later, at 1:00 a.m., on February 2, 2006.

June 20, 2006 Discharge

32. On June 20, 2006, the Fire Department was again called to the Facility and found four inches of diesel for about 200 feet in a ditch adjacent to the Respondent's Facility. A vacuum (Vac) truck was used to vacuum the ditch to free it of diesel.

33. A few days later, on June 26, 2006, TCEQ Emergency Response Coordinator Gregory Goode conducted an investigation of the Respondent's Facility in response to the June 20, 2006, incident. He observed an oily material in the ditch in front of and downgradient from the Respondent's facility.

34. A chemical test strip used by Mr. Goode to assess the material indicated a petroleum product.

35. Diesel contains petroleum hydrocarbons.

36. Additionally, June 2006 sample results that the Respondent commissioned showed elevated levels of total petroleum hydrocarbons (TPH) in the ditch in front of the Respondent's property, thus indicating the presence of diesel.

37. Based on the above Findings of Fact, the diesel in the ditch in front of the Respondent's Facility on June 20, 2006, came from the Respondent's UST in which it stored diesel.

38. Clean-up efforts, began no sooner than July 6, 2006. That was 16 days after the diesel spill on July 20, 2006.

October 16, 2006 Discharge

39. On October 16, 2006, the Fire Department again returned to the Respondent's Facility in response to a complaint and found diesel fuel in the ditch by the roadway and in the Facility's parking lot.

40. Additionally, December 18, 2006 sample results that the Respondent commissioned showed elevated levels of TPH in the ditch in front of the Respondent's property.

41. The diesel in the ditch in front of the Respondent's Facility on October 16, 2006, came from the Respondent's UST in which it stored diesel.

42. The Fire Department initially contained the October 16, 2006 discharge, and there is no evidence that the Respondent ever cleaned after it.

January 22, 2007 Discharge

43. On January 22, 2007, the Fire Department again found diesel fuel in the ditch area in front of the Respondent's Facility.

44. The Fire Department arrived at the Facility at 2:46 p.m., on January 22, 2007, in response to the January 22, 2007 spill. The Respondent's environmental team arrived five hours later, at 7:43 p.m. on January 22, 2007, and began cleanup.

45. On January 24, 2007, Mr. Goode conducted another investigation and again used chemical classifier strips to test for the presence of hydrocarbons in the ditch. He used

the strips at a downstream location on Cypress Lake, because he observed a sheen on the water and dead fish there. These tests indicated the presence of a petroleum product.

46. Both Fire Department personnel and Mr. Goode concluded that the Respondent's Facility was the source of the diesel in the ditch.

47. There is no evidence that materials other than diesel from the Respondent's Facility were discharged that could have caused the sheen that Mr. Goode observed on the water.

48. The diesel in the ditch in front of the Respondent's Facility on January 24, 2007, came from the Respondent's UST in which it stored diesel.

49. In the First Amended Report and Petition, the ED contended that on January 22, 2007, more than 25 gallons (approximately 100 gallons) of diesel was discharged from the Respondent's Facility into the ditch to the south of that property, causing the death of at least 15 fish. However, there is insufficient evidence to conclude that more than 25 gallons of diesel was discharged or that the discharged diesel caused the death of any fish.

50. Because the evidence does not show that more than 25 gallons of diesel was discharged on January 22, 2007, or that the amount of diesel that was discharged led to the death of fish, the discharge on that date was a moderate actual release under the Commission's Penalty Policy rather than a major actual release as claimed by the ED.

July 2, 2007 Discharge

51. On July 2, 2007, Fire Department personnel found at least 100 gallons of diesel mainly concentrated in the ditch in front of the Respondent's Facility. The discharge spread sheen over most of the concrete area of the Facility and downstream in the ditch past the house of a neighbor, Stan Floyd, and into nearby Cypress Lake.

52. Fire Department personnel arrived at the Respondent's Facility at 2:00 p.m. on July 2, 2007.

53. Chris Smith, the Respondent's Environmental Manager, arrived at the Facility at 6:00 p.m. on July 2, 2007, four hours after the Fire Department personnel. The Respondent did not begin containment or clean up until Action Oil Service arrived with a Vac Truck sometime later.

54. A Vac Truck was used on or about July 2, 2007, to remove the bulk of the diesel from the ditch and drainage system.

55. In addition to the Fire Department, the TCEQ's Charmaine Costner; the General Land Office's Ross Penton, Assistant Director, Oil Spill Division, and Jennings Ewing, Regional Director; and Coast Guard personnel responded to the discharge. They all concluded that diesel was discharged from the Respondent's Facility to the ditch to its south and eventually to Cypress Lake.

56. On July 2, 2007, Ms. Costner conducted an investigation at the Facility, in response to the discharge. She observed diesel or gasoline product inside the monitoring wells within the tank hold and "canary yellow" water in the monitoring well, an indication of a release since the tank hold is supposed to be free of product.

57. The presence of product in the tank hold indicates a problem with one of the components of the tank system.

58. On July 2, 2007, Ms. Costner observed diesel product at the Facility in surface cracks, the dispenser islands, and the observation wells and in the ditch and in the slough area leading to Cypress Lake.

59. One source of the ongoing releases was improper maintenance of the Facility's oil/water separator, which was allowed to discharge directly to a nearby ditch.

60. Ms. Costner observed one of Respondent's employees pull the lid off the oil/water separator that was full of product discharging into the east ditch of the Facility.

61. Ms. Costner collected soil samples at the initial discharge site and at the beginning of the bayou feed toward Cypress Lake. She also took water samples at the initial discharge site, the ditch opposite the discharge, the second ditch leading to Stan Floyd's house, and Cypress Lake, which is approximately 500 yards from the Facility.

62. The sample results indicated the presence of hydrocarbons in the ditches and Cypress Lake.

63. Diesel was still present in the ditch when Ms. Costner returned to the Facility for follow-up investigations. She observed visible sheen floating on water in the ditch. There were several booms and absorbent pads that had been in place from past releases at the Facility.

64. Photographs taken by Ms. Costner on July 5, 2007 during a follow-up investigation showed diesel leaching from the Facility's concrete parking lot onto the eastside grass fence line of the Facility and also showed sheen on Cypress Lake.

65. Mr. Ewing observed sheen coming off the concrete through cracks at the Respondent's Facility and at the sumps draining down toward the east ditch. He saw that the east ditch had a lot of diesel fuel in it, which went in front of the facility to the west. He followed it through Stan Floyd's property, through the slough, and into the lake.

66. By following the path in reverse, Mr. Ewing found that that the discharge from the pipes into the ditch was coming from both the drains at the Respondent's Facility and the oil water separator that was on the ground.

67. Mr. Ewing attributed the discharge to the facility's drains overflowing because they had not been maintained.

68. Mr. Penton saw that the discharge originated on the east side of the Respondent's Facility. He saw nothing to indicate that it came from anywhere else.

69. Mr. Penton walked for 150 yards along the ditch that extended upstream to the east beyond the Respondent's Facility, but did not see or smell any diesel or hydrocarbons east of the Facility.

70. Mr. Penton has 30 years of experience in responding to petroleum product spills. He was able to identify the discharged product as diesel by its color and odor, which is consistent. He observed that the diesel was new based on its brown color. He also saw new diesel in the Facility's wells.

71. The Respondent filed an incident report concerning the July 2, 2007 discharge. That report was prepared by the Respondent's Environmental Manager, Chris Smith.

72. In that report, Mr. Smith acknowledged that free product or sheen identified as "Diesel/Fuel oil" impacted "Surface water" as a result of the discharge. He stated, "Product appears to be run-off from diesel fueling area and tank hold." He indicated that the responsible party was "Petroleum Wholesale," the "tank owner."

73. The diesel in the ditch in front of the Respondent's Facility on July 2, 2007, came from the Respondent's UST in which it stored diesel.

July 27, 2007 Discharge

74. On July 28, 2007, the Respondent's Environmental Manager, Chris Smith, submitted a report to the Commission that identified the Respondent as the responsible party for a spill of "Diesel/Fuel Oil" on July 27, 2007. The report acknowledged that, "Product from on going situation floated out of the tank pit and across parking lot due to torrential rains from approximately 7PM to 9PM." It also stated that, "Free product or sheen" identified as "Diesel/Fuel oil" from the discharge impacted "Soil." It also stated, "Product was contained on property using absorbent booms and pads."

75. The Respondent's account of the incident was corroborated by a Fire Department incident report. The Fire Department determined the incident to be a gasoline or other flammable liquid spill. The Fire Department used barricades along with perimeter tape to block off the entrance and exit of the Facility to address the unauthorized discharge.

76. When the Fire Department arrived at the Facility, it found that "the owners of the business were on scene and are in the process of getting the problem solved." That began an extensive clean-up and remediation effort by the Respondent.

Violation No. 3: Failure to Investigate Suspected Releases

77. The ED contends that the Respondent failed to investigate a suspected release within 30 days of discovery as required by 30 TAC § 334.74. Specifically, according to the ED, inventory control records for August 2007 indicated a suspected release that was not investigated.

78. The ED also claims that the Respondent had still not come into compliance with section 334.74 by July 3, 2008, when the ED screened this case for enforcement action. Accordingly, the ED recommends that this violation be treated as if it occurred on 10 occasions, approximately once per month from September 30, 2007, until July 3, 2008.

79. The Facility was closed down by the Fire Department on July 27, 2007, and was not selling any diesel fuel during August 2007. Yet the Facility's inventory control records showed the following shortages in the diesel tank: 488 gallons on August 10, 2007; 24 gallons on August 14; 25-gallon shortages on August 16, 18, and 29; and a 48-gallon shortage on August 31, 2007.

80. On August 9, 2007, MTI Environmental, LLC (MTI) removed 488 gallons of liquid from the Facility's diesel tank.

81. On several dates in August 2007, Billy Wigginton, an independent contractor working at the Facility for the Respondent, removed 25 to 50 gallons of diesel from the Facility's tank for use in his personal diesel-powered vehicle and in diesel-powered machinery used at the site during remediation efforts.

Violation No. 4: Failure to Provide Release Detection Method

82. In the First Amended Report and Petition, the ED claimed that the Respondent violated Water Code § 26.3475(c)(1) and 30 TAC § 334.50(a)(1)(A) by failing to provide a release detection method capable of detecting a release from its UST system.

83. The Respondent's PST registration as of July 2007 indicated that it was using an automatic tank gauge and inventory control as a method of release detection. However, the Respondent was actually using inventory reconciliation in conjunction with vapor monitoring as its primary method and automatic tank gauges (ATGs) as its secondary method.

84. As discussed above concerning Violation Nos. 1 and 2, diesel fuel was released from the Respondent's Facility on February 1, June 20, and October 16, 2006, and January 22, July 2, and July 27, 2007, and flowed into the ditch immediately south of the Respondent's Facility.

85. The Facility's vapor monitoring system and its ATGs failed to detect releases from the Facility's UST system on February 1, June 20, and October 16, 2006, and January 22, July 2, and July 27, 2007.

86. The vapor monitoring point nearest to the ditch where diesel was found was Test Point 10. Yet the vapor monitoring reports for June and October 2006 and January 2007 showed readings of 5 ppm of hydrocarbon. That is the second lowest level of hydrocarbons detected at Test Point 10 from June 2006 through November 2007 and is the background level.

87. In July and August 2010, no hydrocarbons were detected at Test Point 10.

88. One of those months when no hydrocarbons were detected was July 2007, which included the two dates when perhaps the largest discharge of diesel was found in the ditch by the Fire Department, GLO, and TCEQ personnel.

89. The vapor monitoring system at Test Point 10 was not working properly when it detected only 5 ppm of hydrocarbons in June and October 2006 and January 2007 and no hydrocarbons in July 2007 when there were very significant discharges into the ditch very close to Test Point 10.

90. The Facility's diesel tank had a problem with sludge at the bottom that trapped or captured a water float preventing proper operation of the ATG.

91. In July 2007, when two large releases occurred, the ATG readout machine was out of paper and one of the sensors for the diesel tank was not operating properly.

Violation No. 5: Failure to Measure the Water Level

92. The ED claims that the Respondent violated Water Code § 26.3475(c)(1) and 30 TAC § 34.50(d)(1)(B)(iii)(IV) and (d)(4)(A)(i) by not measuring or checking the water level in its USTs.

93. The sections for noting the "Water Stick Level" on the inventory record sheets for the diesel tank were left blank for February, March, April, May, and June 2007.

94. As found above, the Facility's ATG system was not working properly and recording water levels for at least a portion of the period from February through June 2007.

Violation No. 6: Failure to Report a Suspected Release

95. In the First Amended Report and Petition, the ED claimed that the Respondent violated 30 TAC § 327.3(a) and 30 TAC § 334.72(1) and (2) by failing to report a suspected release in August 2007 within 24 hours.

96. As set out under Violation No. 3 and in the Conclusions of Law, the evidence is insufficient to show that the Respondent had reason to suspect a release in August 2007.

Violation No. 7: Failure to Equip the Fill Pipe of the UST with a Tight-Fill Fitting Adapter

97. In the First Amended Report and Petition, the ED alleges that the Respondent violated Water Code § 26.3475(c)(2) and 30 TAC § 334.51(b)(2)(A), but he failed to offer any evidence tending to show those violations.

Violation No. 8: Failure to Submit a Report Regarding Initial Abatement Measures Within 20 Days after Confirmation of a Release of Regulated Substances

98. The ED contends that the Respondent violated 30 TAC § 334.77(b) by not submitting to the Commission within 20 days after confirmation of a release a report summarizing the initial abatement steps taken and any resulting information or data.

99. As discussed under Violation Nos. 1 and 2 and in the Conclusions of Law, there were releases from the Facility on February 1, June 20, and October 16, 2006, and January 22 and July 2 and 27, 2007.

100. Respondent did not submit initial site assessment reports for five of the six releases, and the report it submitted for the July 2, 2007 release was neither timely nor complete.

Violation No. 9: Failure to Conduct Daily and Monthly Inspections of the Stage II Vapor Recovery System

101. In the First Amended Report and Petition, the ED alleged that the Respondent violated TEX. HEALTH & SAFETY CODE ANN. (Health and Safety Code) § 382.085(b) and 30 TAC § 115.244(1) and (3) by failing to conduct daily and monthly inspections of its Stage II Vapor Recovery System.

102. During her investigation of the Facility on July 23, 2009, Ms. Costner requested the daily and monthly inspection records of the Stage II vapor recovery system from the Facility's store manager, Kamrul Islam (Mr. Islam). He informed Ms. Costner that the Facility had not been conducting the inspection of the Stage II vapor recovery system since May 2009.

103. Ms. Costner also requested the inspection records from the Respondent's Environmental Manager, Chris Smith.

104. The daily and monthly Stage II inspection records were never provided by the Respondent to Ms. Costner following her request. Nor were they offered as evidence at the hearing before the ALJ.

Violation No. 10: Failure to Verify Proper Operation of the Stage II Vapor Space Manifolding and Dynamic Back Pressure at Least Once Every 36 Months

105. In the First Amended Report and Petition, the ED alleged that the Respondent violated Health and Safety Code § 382.085(b) and 30 TAC § 115.245(2) by failing to verify proper operation of its Stage II vapor space manifolding and dynamic back pressure at least once every 36 months.

106. From January 28, 2004, until July 22, 2008, the Respondent did not conduct successful tests of its Stage II vapor space manifolding and dynamic back pressure to verify their proper operation.

Violation No. 11: Failure to Maintain Stage II Records at the Station and Make Them Immediately Available for Review upon Request by Agency Personnel

107. In the First Amended Report and Petition, ED alleged that the Respondent violated Health and Safety Code § 382.085(b) and 30 TAC § 115.246(7)(A) by failing to maintain Stage II records at the Facility and make them immediately available for review upon request by agency personnel.

108. During and subsequent to her July 23, 2009 investigation, Ms. Costner requested the Facility's Stage II records from Mr. Islam and Mr. Smith, but they were not provided to her. Nor were they offered as evidence at the hearing before the ALJ.

Violation No. 12: Failure to Remove and Properly Dispose of any Liquid or Debris Found During an Inspection of Any Sumps, Manways, Overspill Containers or Catchment Basins Associated With A UST System Within 72 Hours Of Discovery

109. In the First Amended Report and Petition, the ED alleged that the Respondent violated 30 TAC § 334.42(i) (June 23, 2009) by failing to remove and properly dispose of liquid or debris found during an inspection of any sumps, manways, overspill containers or catchment basins associated with a UST system within 72 hours of discovery.

110. During Ms. Costner's investigation on July 23, 2009, the Facility's spill buckets contained liquid and debris.

111. The spill buckets had also contained liquid and debris on June 29, 2009, when the Respondent inspected them, but they were cleaned on that date.

Penalties

112. To implement Water Code §§ 7.051, 7.052, and 7.053, the Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

113. For the violations that the ED alleged in the First Amended Report and Petition that the Respondent committed, the ED proposed the following penalties:

ED's PROPOSED PENALTIES			
Violation	**Category**	**Events**	**Penalties**
1. Discharge	Major Actual	1	$10,000
2. Discharges	Moderate Actual	5	$26,773
3. Failure To Investigate Suspected Release	Major Potential	10	$53,545
4 & 5. Failure To Provide Release Detections & Failure To Measure Water Level	Major Potential	1	$5,355

6: Failure To Report Suspected Release	Major Programmatic	1	$2,677
7: Failure To Equip The Fill Pipe With Adapter	Moderate Potential	1	$2,677
8: Failure Report Initial Abatement Measures	Major Programmatic	6	$16,064
9: Failure To Conduct Inspect Stage II System	Moderate/Potential	1	$3,003
10: Failure To Verify Proper Operation Of The Stage II	Major/Potential	1	$4,603
11: Failure To Maintain Stage II Records And Make Them Available	Major Programmatic	1	$3,003
12: Failure To Remove And Dispose Of Liquid Or Debris In Containment	Major/Moderate	1	$3,003
TOTAL			**$130,703.00**

Corrective Actions

114. Due to the violations alleged in the First Amended Report and Petition, the ED recommended that the Respondent be required to take corrective actions, some of which are set out in the Ordering Provisions below.

II. CONCLUSIONS OF LAW

Jurisdiction

1. Under Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or of the Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.

2. Under Water Code § 7.052, a penalty may not exceed $10,000 per violation, per day for each of the violations at issue in this case.

3. In determining the amount of an administrative penalty, Water Code § 7.053 requires the Commission to consider several factors.

4. Additionally, the Commission may order the violator to take corrective action. Water Code § 7.073.

5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. (Gov't Code) ch. 2003.

Burden of Proof

6. The ED has the burden of proof in this case by a preponderance of the evidence. 30 TAC § 80.17(d).

Notice

7. As required by Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the First Amended Report and Petition and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.

8. As required by Gov't Code §§ 2001. 051(1) and 2001.052; Water Code § 7.058; 1 TAC § 155.401; and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.

Violation Nos. 1 and 2

9. The Respondent violated Water Code § 26.121(a)(1) and 30 TAC § 334.48(a) on February 1, 2006.

10. The Respondent violated Water Code § 26.121(a)(1) and 30 TAC § 334.48(a) on June 20, 2006. Additionally, the Respondent failed to contain and immediately clean the spill of diesel as required by 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b).

11. The Respondent violated Water Code § 26.121(a)(1) and 30 TAC § 334.48(a) on October 16, 2006. Additionally, the Respondent failed to contain and immediately clean the spill of diesel as required by 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b).

12. The Respondent violated Water Code § 26.121(a)(1) and 30 TAC § 334.48(a) on January 22, 2007.

13. The Respondent violated Water Code § 26.121(a)(1) and 30 TAC § 334.48(a) on July 2, 2007.

14. The Respondent violated Water Code § 26.121(a)(1) and 30 TAC § 334.48(a) on July 27, 2007.

15. There is insufficient evidence to conclude that the Respondent failed to contain and immediately clean the spill of diesel on February 1, 2006, and January 22 and July 2 and 27, 2007, as required by 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b). Those alleged containment and cleaning violations should be dismissed with prejudice to refiling.

Violation No. 3

16. The evidence is insufficient to show that the Respondent had reason to suspect a release in August 2007. If it had no reason to suspect a release, it had no obligation to comply with the requirements of 30 TAC § 334.74. Violation No. 3 should be dismissed with prejudice to refiling.

Violation No. 4

17. The Respondent violated Water Code § 26.3475(c)(1) and 30 TAC § 334.50(a)(1)(A) by failing to provide a release detection method capable of detecting a release from any portion of the UST system.

Violation No. 5

18. Based on the above Findings of Fact, the Respondent failed to record the water levels in the Facility's diesel tank from February through June 2007, in violation of Water Code § 26.3475(c)(1) and 30 TAC § 334.50(d)(1)(B)(iii)(IV) and (d)(4)(A)(i).

Violation No. 6

19. The evidence is insufficient to show that the Respondent had reason to suspect a release in August 2007. If it had no reason to suspect a release, it had no obligation to comply with the requirements of 30 TAC §§ 327.3(a) and 334.72(1) and (2). Violation No. 6 should be dismissed with prejudice to refiling.

Violation No. 7

20. The evidence is insufficient to show that the Respondent violated Water Code § 26.3475(c)(2) and 30 TAC § 334.51(b)(2)(A). Violation No. 7 should be dismissed with prejudice to refiling.

Violation No. 8

21. The Respondent violated 30 TAC § 334.77(b) on six occasions, once for each of the releases on February 1, June 20, and October 16, 2006, and January 22 and July 2 and 27, 2007, by not submitting the report required by that rule.

Violation No. 9

22. Under 30 TAC § 115.249(a), Orange County is in a non-attainment area, and persons there are subject to the requirements of 30 TAC §§ 115.244(1) and (3) and 115.245(2).

23. A facility subject to 30 TAC § 115.244 must keep and make available to the ED's representative upon request its daily Stage II inspection records. 30 TAC § 115.246(6) and (7).

24. When the ED's representative requests inspection records from a facility owner or operator that he is required to keep and those records are not provided to the representative or offered as evidence at the subsequent contested-case enforcement hearing and no reasonable explanation is offered for the failure to produce them, it is reasonable to conclude that the inspections were not performed.

25. The Respondent violated Health and Safety Code § 382.085(b) and 30 TAC § 115.244(1) and (3).

Violation No. 10

26. The Respondent violated 30 TAC § 115.245(2) and Health and Safety Code § 382.085(b).

Violation No. 11

27. The Respondent violated Health and Safety Code § 382.085(b) and 30 TAC § 115.246(7)(A).

Violation No. 12

28. The evidence is insufficient to prove that the Respondent violated 30 TAC § 334.42(i). Violation No. 12 should be dismissed with prejudice to refiling.

Penalties

29. As to Violation No. 1, the evidence is insufficient to prove that 25 gallons of diesel was discharged by the Respondent on January 22, 2007, or that the amount of diesel that was discharged led to the death of fish.

30. Based on the Commission's Penalty Policy, the January 22, 2007 discharge, like the other discharges in this case, was a moderate-actual release.

31. In accordance with Water Code §§ 7.051, 7.052, and 7.053 and the Penalty Policy, the penalty for Violation No. 1 should be $5,000.

32. As to Violation No. 2, the penalty proposed by the ED for Violation No. 2 is appropriate under Water Code §§ 7.051, 7.052, and 7.053 and the Penalty Policy. The same penalty would be appropriate under the Penalty Policy as long as one of the statutes or rules as alleged was violated on each of he alleged dates, which has been shown.

33. Because the evidence is insufficient to prove alleged Violation Nos. 3, 6, 7, and 12, no Penalty should be assessed for those alleged violations.

34. The remaining penalties proposed by the ED are appropriate under Water Code §§ 7.051, 7.052, and 7.053 and the Penalty Policy.

35. Based on the above Findings of Fact and Conclusions of Law, the Respondent should be assessed the following penalties:

ASSESSED PENALTIES			
Violation	**Category**	**Events**	**Penalties**
1. Discharge	Moderate Actual	1	$5,000
2. Discharges	Moderate Actual	5	$26,773
3. Failure To Investigate Suspected Release	Not proven	0	$0
4 & 5. Failure To Provide Release Detections & Failure To Measure Water Level	Major Potential	1	$5,355
6: Failure To Report Suspected Release	Not proven		$0
7: Failure To Equip The Fill Pipe With Adapter	Not proven		$0
8: Failure Report Initial Abatement Measures	Major Programmatic	6	$16,064
9: Failure To Conduct Inspect Stage Ii System	Moderate/Potential	1	$3,003
10: Failure To Verify Proper Operation Of The Stage II	Major/Potential	1	$4,603
11: Failure To Maintain Stage II Records And Make Them Available	Major Programmatic	1	$3,003
12: Failure To Remove And Dispose Of Liquid Or Debris In Containment	Not proven	0	$0
TOTAL			**$63,801**

Corrective Actions

36. Due to the Respondent's violations, the following corrective actions proposed by the ED are necessary and the Respondent should be ordered to take them:

a. Within 30 days after the effective date of the Commission Order, Petroleum Wholesale shall install or implement a release detection method for all USTs at the Facility and begin measuring the water level in the bottom of the tanks to the nearest 1/8 inch at least once a month and making the adjustments in the inventory records, in accordance with 30 TAC § 334.50.

b. Within 60 days after the effective date of the Commission Order, Petroleum Wholesale shall:

(1) Resubmit the Affected Property Assessment Report incorporating the required information requested by the TCEQ Remediation Division, pursuant to 30 TAC § 350.91, to the Executive Director for approval. If response actions are

necessary, comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TAC ch. 350 which may include: plans, reports, and notices under Subchapter E (30 TAC §§ 350.92 to 350.96); financial assurance (30 TAC § 350.33(1)); and Institutional Controls under Subchapter F.

(2) Establish and implement a process for reporting a suspected or a confirmed release, in accordance with 30 TAC § 334.72; and

(3) Submit a report to the agency summarizing the initial abatement steps taken, in accordance with 30 TAC § 334.77.

c. Submit written certification, including detailed supporting documentation to demonstrate compliance with the above requirement within 75 days after the effective date of the Commission Order in this case.

37. In the First Amended Report and Petition, the ED also proposed that the Respondent be ordered to take corrective action concerning a suspected August 2007 release as alleged in Violation Nos. 3 and 6. Because the evidence is insufficient to prove those violations, no corrective action should be ordered related to them.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Petroleum Wholesale L.P. dba Sunmart 363 shall pay an administrative penalty in the amount of $63,801 for violations of Water Code §§ 26.121(a)(1) and 26.3475(c)(1), Health and Safety Code § 382.085(b), and 30 TAC §§ 115.244(1) and (3), 115.245(2), 115.246(7)(A), 327.5(a), 334.48(a), 334.50(a)(1)(A), 334.50(d)(1)(B)(iii)(IV) and (d)(4)(A)(i), 334.75(a)(1) and (b), and 334.77(b). The payment of this administrative penalty and the performance of all corrective action listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks

rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Petroleum Wholesale L.P. dba Sunmart 363, TCEQ DOCKET NO. 2008-1170-MLM-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 30 days after the effective date of the Commission Order, Petroleum Wholesale shall install or implement a release detection method for all USTs at the Facility and begin measuring the water level in the bottom of the tanks to the nearest 1/8 inch at least once a month and making the adjustments in the inventory records, in accordance with 30 TAC § 334.50.

3. Within 60 days after the effective date of the Commission Order, Petroleum Wholesale shall:

   a. Resubmit the Affected Property Assessment Report incorporating the required information requested by the TCEQ Remediation Division, pursuant to 30 TAC § 350.91, to the Executive Director for approval. If response actions are necessary, comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TAC ch. 350 which may include: plans, reports, and notices under Subchapter E (30 TAC §§ 350.92 to 350.96); financial assurance (30 TAC § 350.33(1)); and Institutional Controls under Subchapter F.

   b. Establish and implement a process for reporting a suspected or a confirmed release, in accordance with 30 TAC § 334.72; and

   c. Submit a report to the agency summarizing the initial abatement steps taken, in accordance with 30 TAC § 334.77.

4. Within 75 days after the effective date of the Commission Order, Respondent shall submit written certification as described below, and detailed supporting documentation, including photographs, receipts, and /or other records, to demonstrate compliance with

this Order. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Derek Eades, Manager
Waste Section
Beaumont Regional Office
Texas Commission on Environmental Quality
3870 Eastex Freeway
Beaumont, Texas 77703-1892

5. The alleged violations of 30 TAC §§ 327.5(a) and 334.75(a)(1) and (b), which are portions of Violation No. 1 and related to the spill of diesel on July 27, 2007, are dismissed with prejudice to refiling.

6. The alleged violation of 30 TAC § 334.74, which is Violation No. 3, is dismissed with prejudice to refiling.

7. The alleged violations of 30 TAC §§ 327.3(a) and 334.72(1) and (2), which comprise Violation No. 6, are dismissed with prejudice to refiling.

8. The alleged violations of Water Code § 26.3475(c)(2) and 30 TAC § 334.51(b)(2)(A), which comprise Violation No. 7, are dismissed with prejudice to refiling.

9. The alleged violation of 30 TAC § 334.42(i), which is Violation No. 12, is dismissed with prejudice to refiling.

10. In accordance with 30 TAC § 80.23, the Respondent shall pay for the full cost of the recording and transcription of the hearing.

11. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

12. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

13. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.

14. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.

15. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Bryan W. Shaw, Ph.D., Chairman
For the Commission